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Note

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by
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Introduction

In 1974, two psychologists studying the physical and emotional effects of rape on women coined the term rape trauma syndrome (RTS).[1] Working to develop a two-stage model of recovery, Ann Burgess and Lynda Holmstrom established RTS to identify and describe typical post-rape behaviors experienced by victims of rape and attempted rape.[2] Since their groundbreaking study, subsequent researchers have expanded the descriptive scope of symptoms attributable to traumatic rape.[3] Modern applications of RTS and its variations are pervasive; even the American Psychiatric Association

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1. *See* Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974).

2. *See id.* at 982-83.

3. *See* 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, § 10-1.1, at 403 (1997).

identifies rape as one of the many traumatic events that can lead to the development of posttraumatic stress disorder (PTSD).[4]

Since the emergence of syndrome evidence, courts across the nation have struggled to define principled evidentiary boundaries of admissibility for RTS expert testimony in rape trials.[5] RTS or rape-related PTSD expert testimony is most commonly utilized by the state to rebut a claim of consent asserted by the accused charged with rape. Generally, the state's expert will testify that a woman's[6] post-rape behavior is consistent with that of other rape victims, including those who have been diagnosed with RTS.[7] Less frequently, the prosecution's expert will testify, based upon a personal psychological examination of the victim, that the victim actually suffers from RTS or rape-related PTSD.[8] Historically, juries have questioned the inherent credibility of the female accuser in a rape prosecution. Combating cultural myths, prosecutors also employ RTS evidence to disabuse jurors of prejudicial misconceptions arising from a victim's ostensibly unusual post-rape behavior. To this end, RTS testimony plays a crucial role in educating the jury about the psychological consequences surrounding rape and functions to dispel rape myths by explaining counterintuitive post-rape behavior.[9] In addition, evidence of RTS is particularly beneficial, if not essential, for rape victims in cases where the state can produce little or no physical evidence that a rape actually occurred. Consequently, when the accused asserts a defense of consent, RTS may be the only evidence available to the state proving that a woman has been raped.

Recognizing its evidentiary value, most courts have concluded that RTS is admissible insofar as it is reliable and helpful to the fact-finder in resolving issues of consent.[10] Significantly, courts that

4. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV].

5. *See* Karla Fischer, Note, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome,* 1989 U. ILL. L. REV. 691, 710-13.

6. The author recognizes that this Note refers only to women as victims of rape. This characterization is not intended to diminish the fact that men are also victimized by forcible rape. Rather, the theory of admissibility advanced herein applies to all survivors of rape who seek justice under the law. *See, e.g.*, Elizabeth J. Kramer, Note, *When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV. 293 (1998).

7. *See generally* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.2.2, at 406.

8. *See generally* Fischer, *supra* note 5, at 722-23.

9. *See, e.g.*, Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 664-67 (1998); Bridget A. Clarke, Comment, *Making the Woman's Experience Relevant to Rape: The Admissibility of Rape Trauma Syndrome in California,* 39 UCLA L. REV. 251, 274-79 (1991).

10. *See* Jennifer J. Hackman, Comment, Henson v. State*: Rape Trauma Syndrome Used by the Defendant as well as the Victim,* 19 AM. J. TRIAL ADVOC. 453, 458 (1995).

previously rested theories of admissibility upon the scientific validity of RTS research are now faced with defendants who assert the right to employ in their defense the same social science.[11] Some states, while acknowledging the detrimental effect on rape victims, have reasoned that when the prosecution introduces RTS evidence to rebut a defense of consent, fundamental fairness requires that the accused be permitted to proffer similar syndrome testimony.[12] At least one state supreme court has gone even further, declaring that defendants have the right to introduce RTS testimony concerning the victim's sexual behavior, even when the state has declined to do so first.[13]

Arguably, however, liberal admissibility of defense-sponsored RTS evidence substantially undermines core values embodied in rape shield legislation. Prompted by feminists and law enforcement advocates, all but two states and the federal government have enacted rape shield statutes designed to protect victims against the invasion of privacy, potential embarrassment, and sexual stereotyping endured by women who publicly prosecute rape.[14] However, when the accused is permitted to present RTS evidence in his defense, "a psychological concept with origins in the desire to aid victims of sexual abuse may now be employed to subject those victims to compelled psychological examinations, and searching cross-examination regarding past sexual history."[15] Thus, the very research social scientists developed to overcome institutional biases endured by rape victims for decades, is now being used by defendants to prevent those same victims from obtaining justice. Consequently, in seeking to preserve rape shield protections, some commentators have contended that the accused must be categorically precluded from relying on evidence of RTS.[16]

However, unqualified exclusion of defense-sponsored RTS evidence, while preserving core rape shield values, fails to comport with the Sixth Amendment rights of the accused. Originally intended to protect rape victims from a humiliating trial experience, rape shield exclusionary rules can now be employed to strip the accused of the

11. *See* Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1324-27 (1994); Hackman, *supra* note 10, at 453; Nicole Rosenberg Economou, Note, *Defense Expert Testimony on Rape Trauma Syndrome: Implications for the Stoic Victim*, 42 HASTINGS L.J. 1143, 1152-57 (1991).

12. *See, e.g.*, People v. Wheeler, 602 N.E.2d 826, 833 (Ill. 1992); Henson v. State, 535 N.E.2d 1189, 1193 (Ind. 1989).

13. *See Henson*, 535 N.E.2d at 1193-94.

14. *See* Peter M. Hazelton, Note, *Rape Shield Laws: Limits on Zealous Advocacy*, 19 AM. J. CRIM. L. 35, 35-36 & n.2 (1991).

15. 1 FAIGMAN ET AL., *supra* note 3, § 10-1.5, at 413-14.

16. *See, e.g.*, Economou, *supra* note 11.

ability to adequately defend against the state's charge.[17] Consequently, "the rape defendant who claims consent as his defense [now] enters the system under a cloud of guilt."[18] Due process and the Sixth Amendment provide that the accused in a criminal trial shall have a fair opportunity to present complete evidence and to fully defend against the state's accusations.[19] Absent countervailing concerns, privacy interests of the victim in a rape trial may be sufficient to substantially outweigh the Sixth Amendment rights of the accused to present a complete defense.[20] Indeed, the Supreme Court has expressly recognized that legitimate state social policy can constitutionally justify precluding relevant evidence of the victim's prior sexual history with the accused.[21] Nevertheless, under some circumstances, such as when the prosecution introduces RTS evidence to refute a defense of consent, the scales of relevance begin to tip in favor of the constitutional rights of the accused.[22] When the state relies upon RTS evidence, core constitutional values and principles of adversarial fairness combine to require that the accused be permitted to present all the essential elements of his defense.

Moreover, the unestablished scientific reliability of the social science research methodology supporting RTS renders RTS evidence highly relevant for the accused.[23] Currently, there is substantial scientific disagreement regarding the nature and range of traumatic events capable of precipitating PTSD. In addition, the present ability of social scientists to sufficiently distinguish symptoms attributable to rape-related PTSD from those induced by other previous traumatic events is questionable.[24] As a result, courts will increasingly encounter rape defendants asserting the right to establish that a woman's post-rape behavior is inconsistent with a diagnosis of RTS, or to prove that an alternative traumatic event, including a previous rape, is the source of her symptoms.

The balance courts strike in determining appropriate evidentiary boundaries for defense-sponsored use of RTS should reflect values embodied in the United States Constitution, state rape shield laws, and the validity of the social science research underlying RTS and

17. *See* Hackman, *supra* note 10, at 467-68.

18. *Id.* at 468.

19. *See* U.S. CONST. amend. VI; *see also* Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

20. *See* Jeffrey T. Waddle & Mark Parts, Comment, *Rape Trauma Syndrome: Interest of the Victim and Neutral Experts,* 1989 U. CHI. LEGAL F. 399, 413.

21. *See* Michigan v. Lucas, 500 U.S. 145, 151 (1991).

22. *See* Waddle & Parts, *supra* note 20, at 413.

23. *See infra* Part IV.

24. *See* Stefan, *supra* note 11, at 1324-27; *see also* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.2.1, at 405-06.

PTSD diagnoses.[25] Allowing unlimited prosecutorial use of RTS evidence while categorically precluding defendants access to the same research is fundamentally unfair and unconstitutionally deprives those accused of rape the right to present a complete defense.[26] On the other hand, many courts will be cautious in admitting defense-sponsored RTS testimony to the extent that such admission undermines the protective policies preserved by rape shield laws.[27] To resolve this tension, courts must formulate an approach that carefully considers each of these important competing interests, while methodically evaluating the validity of the social science, and thoughtfully balancing conceptions of fairness and necessity.

As an initial proposition, this Note argues that fundamental fairness and the Constitution require courts to permit defendants to utilize RTS expert testimony for the purposes of rebutting a charge of rape. When the prosecution fails to initially introduce RTS evidence, privacy interests of the victim substantially outweigh the defendant's constitutional rights, and the exclusion of defense-sponsored RTS testimony is justified.[28] However, when the state opens the door to the use of generalized or diagnostic RTS expert testimony, the victim's psychological health becomes relevant to a constitutionally complete defense. Under such circumstances, due process and the Sixth Amendment demand that the accused be permitted to defend himself with the same scientific tools available to the state.[29] Moreover, to the extent social scientists are unable to conclusively determine the precipitating trauma leading to the development of RTS, the victim's sexual history becomes relevant for the accused. Taken together, these two factors render a woman's sexual behavior extremely relevant to the defendant's ability to present a complete defense as guaranteed by the Constitution. Thus, the state's interest in advancing legitimate rape shield policy is substantially outweighed by principles of adversarial fairness, scientific integrity, and the Sixth Amendment rights of the accused to a fundamentally fair trial.

Part I of this Note briefly defines RTS and rape-related PTSD, the social and scientific circumstances that precipitated the research, and applications of the science to the modern legal fact-finding context. Part II of this Note identifies and describes the types of RTS

25. *See* David L. Faigman, *The Syndromic Lawyer Syndrome: A Psychological Theory of Evidentiary Munificence,* 67 U. COLO. L. REV. 817, 823-26 & n.21 (1996); *see also* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.5, at 413.

26. *See* Henson v. State, 535 N.E.2d 1189, 1193 (Ind. 1989) ("It would be fundamentally unfair to allow the use of such testimony by the State . . . and then deny its use by a defendant here.").

27. *See* Faigman, *supra* note 25, at 825 & n.21.

28. *See* Waddle & Parts, *supra* note 20, at 411-13.

29. *See* People v. Wheeler, 602 N.E.2d 826, 831-33 (Ill. 1992).

and PTSD expert testimony typically utilized by the state in a rape prosecution, as well as the theories of admissibility upon which such use is justified. Part III explores recent case law contemplating and permitting RTS evidence offered by the accused and anticipates contemporary objections to admissibility. Part IV describes the status of the social science research underlying RTS and PTSD, with particular emphasis on methodological weaknesses and problems with the application of syndrome evidence to the judicial fact-finding function. Part V critically examines the relationship between rape shield prohibitions and the constitutional rights of the accused in an evidentiary context and discards as unconstitutional the categorical preclusion of defense-sponsored RTS.

This Note concludes in Part VI by proposing that courts adopt a rule of admissibility permitting the accused to employ RTS evidence for the limited purpose of rebutting a claim of nonconsent. Unless the victim consents to an examination by an expert of the defendant's choice, the state should be barred from introducing RTS testimony based on a personalized psychiatric diagnostic examination of the victim.[30] Even scientists and commentators sympathetic to prosecutorial use of RTS to aid survivors of rape concede that "if . . . the prosecution decides to call a treating or nontreating expert to testify about the complainant's symptoms, the defendant . . . should be entitled to a court order compelling [her] to submit to an examination by the defendant's expert."[31] This Note, however, will also emphasize that the state retains the power to preclude defendants from exercising these potentially oppressive rights. When the state refrains from introducing evidence of RTS, or in the alternative, limits its use of RTS evidence to generalized consistency testimony not based on a personalized victim examination, the accused can be constitutionally barred from compelling an adverse victim examination. While this proposal appears to strike at the heart of core rape shield values, this Note argues that it is the only principled and just solution to a vexing constitutional question.

I. Overview of Rape Trauma Syndrome

Rape trauma syndrome is a general term used by psychologists to describe typical behavioral responses experienced by victims of rape.[32] RTS was first coined in 1974 by two psychologists to describe

30. *See id.* at 833.

31. Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 457 (1985); *see also Wheeler*, 602 N.E.2d at 830-33.

32. *See* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.1, at 403. RTS has been used to describe general post-rape behavior, the Burgess/Holmstrom two-stage model of recovery,

a two-phase model of recovery exhibited by survivors of rape.[33] Working at a Boston hospital emergency room, Ann Burgess and Lynda Holmstrom conducted a year-long study of the physical, behaviorial, and psychological responses typically displayed by women seeking treatment for rape or an attempted rape.[34] Burgess and Holmstrom concluded that the women they examined characteristically exhibited a two-phase response to traumatic rape.[35] According to the Burgess/Holmstrom model, a woman suffering from rape trauma syndrome initially experiences the "acute phase."[36] This first stage of recovery occurs in the immediate hours following the attack and consists of at least two different stress reactions.[37] According to the model, approximately half of all women victimized by rape exhibit an "expressive style" response, which is characterized by overtly emotional behavior.[38] Women in this group may experience a range of post-rape behavioral responses including crying, sobbing, feelings of anxiety, and what may be perceived to be "inappropriate" smiling.[39] In contrast, other women may exhibit none of these symptoms at all, suggesting that no rape has occurred.[40] This group exhibits a "controlled style" and is subdued, calm, and non-emotional.[41] Physical symptoms characteristic of this first "acute phase" include soreness, bruising, headaches, sleeplessness, fatigue and genitourinary disturbance.[42]

The second phase of recovery, called the "long-term reorganization" process, was experienced by all victims in the Burgess/Holmstrom sample and is characterized by nightmares, phobic reactions, and sexual fears.[43] Rape survivors in this stage can manifest symptoms at various points throughout their recovery; some

and rape-related PTSD. *See id.* Thus, while the term RTS is frequently employed in the legal decision-making context, its varied meanings can cause confusion. *See id.*

33. *See* Burgess & Holmstrom, *supra* note 1, at 981.

34. *See id.*

35. *See id.* at 982-83; *see also* People v. Taylor, 552 N.E.2d 131, 133-34 (N.Y. 1990) (discussing the Burgess/Holmstrom two-stage model of victim recovery); Massaro, *supra* note 31, at 424-26; Orenstein, *supra* note 9, at 702; Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133, 155 (1989).

36. Burgess & Holmstrom, *supra* note 1, at 982.

37. *See id.*

38. Clarke, *supra* note 9, at 258.

39. Burgess & Holmstrom, *supra* note 1, at 982.

40. *See* Clarke, *supra* note 9, at 258.

41. Burgess & Holmstrom, *supra* note 1, at 982.

42. *Id.*

43. *Id.* at 983-84 (explaining that other symptoms characteristic of the second recovery stage may include increased motor activity such as taking long trips, changing address or phone numbers, and contacting friends and family whom the victim normally does not often see).

may not become symptomatic for months or even years after the rape.[44] Moreover, a woman could continue to exhibit symptoms that can persist for decades, and throughout her lifetime.[45]

Since the groundbreaking Burgess/Holmstrom study, researchers have extensively documented commonly observed symptoms associated with rape trauma syndrome.[46] While the Burgess/Holmstrom inquiry focused on describing stages of recovery, more recent research has conceptualized RTS as a range of specific symptoms characterizing a woman's physical and emotional response to forcible rape, rather than a syndrome.[47] According to this model, women suffering from RTS may experience depression, anxiety, guilt, nightmares, fear of men, fear of indoors or outdoors (correlating to the type of environment where the rape occurred), flashbacks, and constant reliving of the traumatic event.[48] Other indicia include withdrawal, decreased sexual desire, change in eating and sleeping habits, unease at work, and hypervigilance.[49] Studies comparing women who have been forcibly raped with those in the general population reveal that rape victims experience these symptoms with much greater frequency than do nonvictims and victims of other traumatic events.[50]

In addition to the two variations of RTS described above, rape is a traumatic event that can lead to the development of posttraumatic stress disorder (PTSD).[51] PTSD was initially recognized by psychologists working with veterans of the Vietnam War and was officially defined by the American Psychiatric Association in 1980.[52] Like other modern conceptualizations of RTS, the fourth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) characterizes rape-related PTSD as an identifiable set of stress-induced symptoms.[53] However,

44. *See* State v. Jones, 615 N.E.2d 713, 719 (Ohio Ct. App. 1992).

45. *See* Clarke, *supra* note 9, at 259; *see also* Patricia A. Frazier & Eugene Borgida, *The Scientific Status of Research on Rape Trauma Syndrome*, *in* 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, § 10-2.2.1, 414, 418-21 (David L. Faigman et al. eds., 1997) (observing that lifetime prevalence rates are higher for victims of rape than for nonvictims and victims of other trauma).

46. *See* Clarke, *supra* note 9, at 256 n.21; *see also* David McCord, *The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions*, 26 B.C. L. REV. 1143, 1145-55, 1165-69 (1985).

47. *See* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.1, at 403; *see also* Clarke, *supra* note 9, at 256 & n.21; McCord, *supra* note 46, at 1146-49.

48. *See* Clarke, *supra* note 9, at 256-59.

49. *See id.* at 256.

50. *See* Frazier & Borgida, *supra* note 45, § 10-2.2.1, at 418-19.

51. *See* DSM-IV, *supra* note 4, at 424, 427-29.

52. *See* Hackman, *supra* note 10, at 455-56.

53. DSM-IV, *supra* note 4, at 427-29.

unlike the traditional embodiment of RTS, which is premised on traumatic rape, several nonrape-related traumatic events can precipitate the onset of PTSD.[54] Consequently, while RTS is often described as a particular type of PTSD, it is more accurate to refer to rape as a traumatic event that can result in the development of PTSD, rather than to classify RTS as a subcategory of PTSD.[55]

According to the DSM-IV, the essential feature of PTSD is the development of characteristic symptoms resulting from exposure to an extreme traumatic stressor involving actual or threatened death or serious injury.[56] Specifically, to be diagnosed as suffering from rape-related PTSD, the rape victim must exhibit four post-rape behavioral stress responses.[57] First, as a general matter, the precipitating traumatic event causing the stress must be of sufficient magnitude to evoke "intense fear, helplessness, or horror" in the victim.[58] Second, the rape victim must reexperience her trauma through flashbacks or recurrent and intrusive recollection of the rape.[59] Dreams and nightmares are common.[60] In particular, a survivor of rape may experience nonmastery dreams in which she is unable to successfully overpower her assailant.[61] Third, she must present at least three avoidance and numbing symptoms.[62] Symptoms may include avoiding activities that arouse recollection, avoiding thoughts or feelings about the trauma, numbing of responsiveness to the environment, reducing involvement with her environment, or feeling detached from others.[63]

In order for post-rape behavior to meet the PTSD diagnostic criteria, two of the following increased arousal symptoms must be present that were not present prior to the rape: (1) difficulty falling or staying asleep; (2) irritability or outbursts of anger; (3) difficulty concentrating; (4) hypervigilance; and (5) exaggerated startle

54. *See id.* at 424.

55. *See* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.1, at 403. This is an important distinction because such an erroneous classification can be misleading to the extent that the symptoms listed in the psychiatric diagnostic manuals supporting a diagnosis of PTSD, are not necessarily the same as those described by Burgess and Holmstrom or subsequent research studies. *See id.*

56. DSM-IV, *supra* note 4, at 424.

57. *See id.* at 428.

58. *Id.*

59. *See* Hackman, *supra* note 10, at 455; *see also* Cynthia F. Feagan, *Rape Trauma Syndrome Testimony As Scientific Evidence: Evolving Beyond* State v. Taylor, 61 U. MO. KAN. CITY L. REV. 145, 151-52 (1992).

60. *See* DSM-IV, *supra* note 4, at 424.

61. *See id.*; *see also* Feagan, *supra* note 59, at 151.

62. *See* DSM-IV, *supra* note 4, at 428.

63. *See* Frazier & Borgida, *supra* note 45, § 10-2.2.1, at 417-18.

response.[64] Although symptom duration is often not assessed in research studies, the above symptoms must be present for at least one month to qualify for a diagnosis of rape-related PTSD.[65] And, while symptoms generally dissipate over time, they can persist for years after the victim experiences the initial trauma.[66] Finally, the rape must have caused significant distress or impairment in social, occupational, or other important areas of a woman's functioning.[67]

To summarize, the designation of RTS is used to refer not only to the original Burgess/Holmstrom model of recovery, but also to general post-rape behavioral responses, and the more specific symptomology associated with a diagnosis of rape-related PTSD.[68] While a woman's post-rape behavior may fail to meet the diagnostic criteria necessary for PTSD, she may still exhibit symptoms consistent with other models.

II. Admissibility of Rape Trauma Syndrome by the Prosecution[69]

Since the first wave of RTS cases in the early 1980's, jurisdictions around the nation have struggled to reconcile competing rights and interests in an effort to construct a principled standard of admissibility for RTS evidence.[70] In fashioning distinct evidentiary

64. *See* DSM-IV, *supra* note 4, at 428; *see also* Hackman, *supra* note 10, at 456. Providing a more simplified description, one commentator has explained that:

> Symptoms of RTS are, for simplicity's sake, divided into two categories of behavior that a woman who has been raped may exhibit: avoidant behavior and intrusive ideation. Avoidant behavior can be present in a number of ways, but is best characterized by a woman who, after the rape, avoids any person, situation or location that reminds her of the rape. Intrusive ideation is the opposite. These women relive the rape over and over in their minds and can have flashbacks based on anything that reminds them of the rape, resulting in lack of concentration and sleep.

Id. (citations omitted).

65. *See* DSM-IV, *supra* note 4, at 429.

66. *See* Clarke, *supra* note 9, at 259; Frazier & Borgida, *supra* note 45, § 10-2.2.1, at 418-21.

67. *See* DSM-IV, *supra* note 4, at 429.

68. *See* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.1, at 403.

69. The selection and arrangement of the following classification of cases are substantially based upon the thoroughly researched work of Karla Fischer. *See* Fischer, *supra* note 5.

70. *See id.* at 710-13. Pursuant to the Federal Rules of Evidence, trial courts have broad discretion to admit RTS evidence insofar as it is relevant and helpful to the fact-finder in determining a fact in issue. *See* FED. R. EVID. 702. Modifying this flexible rule of admissibility, the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals., Inc.*, 509 U.S. 579, 592-93 (1993), held that when considering a proffer of scientific evidence, judges must function as gatekeepers who are responsible for screening out unreliable or methodologically invalid evidence. It is unclear whether and to what extent this new

boundaries, the judicial treatment of RTS reflects diverse views about how social science, rape shield laws, and the Sixth Amendment rights of the accused should be balanced.[71]

Almost all courts prohibit RTS testimony that states or implies that a victim has actually been raped.[72] This type of expert testimony is characterized as a direct judgment of the victim's credibility, which is to be determined exclusively by the jury.[73] Thus, in a typical case, the court in *State v. McCoy* held that in a prosecution where the defense is consent, expert testimony regarding the existence of symptoms consistent with RTS is admissible.[74] However, in distinguishing between the legitimate use of countering a claim of consent and the impermissible use of bolstering victim credibility, the court declared that "[w]e . . . must draw a distinction between an expert's testimony that an alleged victim exhibits post-rape behavior consistent with rape trauma syndrome and expert opinion that bolsters the credibility of the alleged victim by indicating that she was indeed raped."[75]

The exclusion of RTS testimony for these purposes is traditionally based on the rationale that allowing expert opinion on credibility would impermissibly invade the province of the jury.[76] Consequently, to maintain the integrity of the fact-finding process, courts will not permit an expert to make a legal conclusion or testify

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standard will or should affect admissibility of RTS evidence and other psychiatric expert testimony. *See generally* Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?*, 40 WM. & MARY L. REV. 1 (1998); Allison Morse, *Social Science in the Courtroom: Expert Testimony and Battered Women*, 21 HAMLINE L. REV. 287 (1998); David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67 (1997); Krista L. Duncan, *"Lies, Damned Lies, and Statistics"? Psychological Syndrome Evidence in the Courtroom After Daubert*, 71 IND. L.J. 753 (1996).

71. *See* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.5, at 413 (recognizing that courts must engage in the balancing of competing constitutional, social scientific, and evidentiary values in order to forge principled boundaries of admissibility).

72. *See* Fischer, *supra* note 5, at 724-26; *see also* State v. Alberico, 861 P.2d 192, 210 (N.M. 1993) ("[PTSD] may not be offered to establish that the alleged victim is telling the truth; that is for the jury to decide."); State v. Taylor, 663 S.W.2d 235, 239 (Mo. 1984) (en banc) (concluding that "expert opinion testimony is not admissible as it relates to credibility of witnesses"); State v. Martens, 629 N.E.2d 462, 467-68 (Ohio Ct. App. 1993) (declaring that RTS testimony was admissible to explain the victim's post-rape reactions but not admissible to prove that a rape occurred) (citing People v. Taylor, 552 N.E.2d 131, 138-39 (N.Y. 1990)).

73. *See* State v. Saldana, 324 N.W.2d 227, 230-31 (Minn. 1982).

74. 366 S.E.2d 731, 736-37 (W. Va. 1988).

75. *Id.* at 737; *see also* State v. Taylor, 663 S.W.2d 235, 240 (Mo. 1984) (en banc) (holding that "[such a] conclusion vouches too much for the victim's credibility and supplies verisimilitude for her on the critical issue of whether defendant did rape her").

76. *See Saldana*, 324 N.W.2d at 230; *see also* Fischer, *supra* note 5, at 725.

regarding an ultimate issue of fact in the trial, namely, that the victim was raped.[77]

A. Social Frameworks

While there is significant agreement among courts concerning *prohibited* uses of RTS testimony, there is considerable disagreement regarding *permitted* uses of RTS testimony.[78] As described in detail below, RTS and PTSD testimony is ordinarily proffered by the prosecution in cases where the defense to a rape charge is consent. Most courts have determined that general expert testimony offered by the prosecution to explain unusual aspects of a victim's post-rape behavior is admissible.[79] In addition, virtually all courts permit expert testimony to rebut an express or implied assertion by the accused that the victim's post-rape behavior is not typical for a woman who has been raped.[80] Some ostensibly peculiar responses may include the victim's interactions with police, unexpected delay in reporting the rape, or inconsistent statements made to the police regarding the rape.[81] Other counterintuitive behavioral responses characteristically exhibited by survivors of rape include emotional detachment immediately following the rape, memory loss, and the unequivocal denial that a rape has occurred.[82]

Because much of a victim's post-rape behavior may appear inconsistent with a lay juror's notion of appropriate post-rape behavior, a juror may improperly conclude that no rape has occurred.[83] As a result, expert testimony is generally admissible to

77. *See* Fischer, *supra* note 5, at 725. However, a majority of states have adopted the Federal Rules of Evidence which provide that a testifying expert may give an opinion that embraces the ultimate issue—that is, whether or not the complainant was raped. *See* FED. R. EVID. 702.

78. *See* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.2, at 404.

79. *See* Fischer, *supra* note 5, at 713-14.

80. *See* 1 FAIGMAN ET AL., *supra* note 3, at 406 & n.20; *see also* People v. Hampton, 746 P.2d 947, 953-54 (Colo. 1987) (Lohr, J., concurring) (en banc) (admitting RTS testimony for the limited purpose of explaining the victim's delay in reporting); State v. Moran, 728 P.2d 248, 253-56 (Ariz. 1986) (permitting admission of expert testimony explaining that the presence of certain typical behavioral responses including delayed reporting and recantation was not inconsistent with sexual abuse).

81. *See* Clarke, *supra* note 9, at 274-78.

82. *See* Fischer, *supra* note 5, at 714.

83. *See, e.g.*, State v. Robinson, 431 N.W.2d 165, 172-73 (Wis. 1988) (refusing to allow the accused to capitalize on commonly held misconceptions regarding appropriate post-assault behavior); *Hampton*, 746 P.2d at 952 (recognizing that "[t]he lay notion of what behavior logically follows the experience of being raped may not be consistent with the actual behavior which social scientists have observed from studying rape victims"); People v. Bledsoe, 681 P.2d 291, 298 (Cal. 1984) (en banc) (observing that RTS evidence serves a particularly vital function "by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of

negate misconceptions about rape and counteract juror bias in favor of the accused.[84] By providing background information regarding the wide range of appropriate post-rape reactions women experience, the expert creates a social framework within which the jury can more fairly and accurately evaluate witness credibility.[85] In this way, the expert can explain counterintuitive behavior and provide a deeper and more insightful understanding into the social context in which certain phenomena occur.

Finally, some courts allow the prosecution to admit expert testimony describing the general characteristics of RTS.[86] Under this approach, courts distinguish between general descriptive testimony and testimony based on a psychological diagnosis.[87] Here, the expert may not assert that the victim actually suffers from RTS or rape-related PTSD. Rather, she is limited to explaining the general theory underlying RTS, and the various behavioral responses associated with

popular myths").

84. *See* Fischer, *supra* note 5, at 714; *but see* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.5, at 412 (observing that there is little empirical evidence to support the contention that jurors hold stereotypical and inaccurate views of a woman's reactions to sexual assault).

85. *See generally* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987). Walker and Monahan coined the term "social frameworks" to describe a particular use of social science evidence. They explain that:

> [When] empirical information is being offered that incorporates aspects of both of the traditional uses [legislative and adjudicative fact-finding]: general research results are used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case. We call this new use of social science in law the creation of *social frameworks*.

Id. at 559.

86. *See* People v. Hampton, 746 P.2d 947, 951-52 (Colo. 1987) (en banc) (admitting expert testimony describing the complex psychological responses attributable to RTS in addition to an explanation of counterintuitive post-rape behaviors). In *Hampton*, a qualified expert testified that "rape victims' reactions to men usually change, that most rape victims wish to avoid or escape from the scene of a sexual assault and that a rape victim is less likely to report a rape when the assailant is someone with whom she is acquainted rather than a stranger." *Id.* at 948. In that case, the permissible testimony was not particular to the victim, though lay testimony regarding the victim's post-rape reactions demonstrated consistency with RTS and provided the necessary predicate to support the nexus requirement for relevancy. *See id.* While the court seemed primarily concerned with the scope of the testimony, in a concurring opinion Justice Lohr declared that the court did not decide whether the scope of generalized RTS testimony could permissibly extend beyond an explanation of seemingly unusual post-rape reactions such as delayed reporting. *See id.* at 953 (Lohr, J., concurring).

87. According to Fischer, this approach to admissibility focuses on scope rather than purpose. *See* Fischer, *supra* note 5, at 717-19. Thus, in cases where courts admit general RTS testimony, they are less concerned with whether it is limited to an explanation of atypical responses. Rather, the analysis distinguishes between permissible general testimony and impermissible particularized testimony. That is, the expert may discuss a class of victims, but must refrain from referring to an individual victim.

an RTS diagnosis.[88] This type of evidence differs from testimony describing general post-rape behavior because the expert actually describes RTS symptoms in a hypothetical victim and is not limited to the explanation of counterintuitive behavior.[89] Furthermore, the testimony is offered as circumstantial evidence of lack of the victim's consent, rather than to merely reconcile behavioral inconsistencies.[90] The expert need not have examined the victim; therefore, her testimony merely creates an inference of nonconsensual intercourse, leaving the jury free to conclude that a rape has occurred.[91]

B. Consistency Testimony

The most accepted form of RTS testimony is offered to show that a victim's post-rape behavior is consistent with that of a woman who suffers from RTS.[92] Even courts most critical of RTS permit lay testimony regarding the extent to which a victim's behavior after the alleged incident is consistent with a traumatic event.[93] In this context, expert testimony typically consists of an opinion concerning characteristic behavior present in a woman with RTS and the extent to which the victim's symptoms and post-rape behaviors are consistent or inconsistent with RTS symptomology.[94] Unlike testimony that is limited to refuting an assertion by the accused that the victim's behavior is inconsistent with a woman who has been raped, under the consistency approach the prosecution may introduce RTS in its case-in-chief. Under this theory of admissibility, the expert does not actually render a diagnosis that the victim is suffering from RTS, but rather testifies generally regarding the typical behaviors associated with RTS and the extent to which the victim's post-rape behavior is consistent with such a diagnosis.[95] Testimony of this type is particularly beneficial in cases where there is no physical evidence that a rape occurred, and is most often utilized by the prosecution to rebut the defendant's claim that the victim consented.[96]

88. *See id.* at 717-18. As such, the testimony may not be limited to the explanation of counterintuitive post-rape reactions. Rather, the expert could testify regarding RTS generally, on the theory that the entire phenomenon of rape is complex and beyond juror understanding.

89. *See id.* at 718.

90. *See id.* at 717.

91. *See id.*

92. *See* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.2.2, at 406. Though fewer courts admit consistency testimony than do those that admit prosecutorial rebuttal testimony to prove post-rape behavior was not inconsistent with one who has been raped. *See id.*

93. *See id.; see also* State v. Black, 745 P.2d 12, 19 (Wash. 1987) (en banc).

94. *See* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.2.2, at 406.

95. *See* Fischer, *supra* note 5, at 720-22.

96. *See* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.2.2, at 406.

This approach has been followed in at least four state supreme courts.[97] In *State v. McCoy*, the West Virginia Supreme Court allowed the prosecution's expert to testify that the post-rape symptoms exhibited by the victim were consistent with those normally attributable to RTS.[98] There, the court reasoned that this type of testimony was distinguishable from expert testimony which impermissibly bolsters the credibility of the victim because it does not assert that a rape has occurred.[99] Rather, the expert properly leaves this inference to be drawn by the fact-finder after describing the presence of symptoms consistent with RTS or PTSD.[100]

Similarly in *State v. Taylor*, the Missouri Supreme Court upheld the admissibility of expert testimony asserting that the victim exhibited characteristics consistent with those resulting from a traumatic stress reaction such as forcible rape.[101] However, the court refused to admit testimony that the victim was actually diagnosed with RTS because such testimony was considered to be highly prejudicial.[102] The court distinguished diagnostic testimony based on

97. *See* State v. Jensen, 432 N.W.2d 913, 918-20 (Wis. 1988); State v. McCoy, 366 S.E.2d 731 (W. Va. 1988); Simmons v. State, 504 N.E.2d 575 (Ind. 1987); State v. Taylor, 663 S.W.2d 235 (Mo. 1984) (en banc).

98. 366 S.E.2d at 733 (permitting qualified expert to testify about common behavior of rape victims and give her opinion regarding whether the complainant's post-incident reactions conformed to typical post-rape behavior).

99. *See id.* at 737 (conceding that RTS is relevant and admissible in a prosecution for rape where the defense is consent and declaring, "[t]he expert may testify that the alleged victim exhibits behavior consistent with rape trauma syndrome, but the expert may not give an opinion, expressly or implicitly, as to whether or not the alleged victim was raped"); *see also* State v. Alberico, 861 P.2d 192, 210 (N.M. 1993). Grounding its reasoning in the scientific validity of PTSD research, the New Mexico Supreme Court in *Alberico* declared that:

> Allowing an expert to testify that PTSD symptoms are a common reaction to sexual assault for the purpose of rebutting the defense that the victim's reactions to the alleged incident are inconsistent with sexual assault is no different from allowing the expert to testify that the alleged victim's symptoms are consistent with sexual abuse. Although ... some ... courts maintain a bright-line distinction between these two purposes ... we see no logical difference. Both of these purposes for which PTSD evidence is offered rest on the valid scientific premise that victims of sexual abuse exhibit identifiable symptoms. Either the PTSD diagnosis is a valid scientific technique for identifying certain symptoms of sexual abuse or it is not.

Id.

100. *See McCoy*, 366 S.E.2d at 737.

101. 663 S.W.2d at 240 ("Properly qualified, an expert in the psychological testing field may testify that the patient, client or victim does possess and exhibit the characteristics consistent with those resulting from a traumatic stress reaction, such as rape.").

102. *See id.* In *Taylor*, the court acknowledged that the existence of psychological symptoms in a victim, which correspond to a traumatic stress reaction, is probative on the issue of force. *Id.* However, the court feared that particularized diagnostic testimony stating that the victim suffers from RTS suggests that the syndrome may only be caused by

a victim examination from general consistency testimony because the jury is more likely to regard the former as dispositive on the issue of consent. According to the court in *Taylor*, by cloaking the testimony in a particularized diagnosis, the jury would be misled by an "aura of certainty" that surrounds scientific evidence.[103] Therefore, the *Taylor* court limited the admissibility of victim-specific testimony to an explanation of whether the victim's behavior is consistent with RTS and refused to permit the expert to render an actual diagnosis.[104]

C. Diagnostic Testimony

Declining to follow the reasoning set forth in *Taylor*, a minority of state courts will admit expert testimony that the victim has actually been diagnosed with RTS or rape-related PTSD to refute the defense of consent.[105] This type of testimony is very different from the above described consistency approach because it creates a much stronger inference that the victim has been raped and can be construed by the jury to be an expert validation of the victim's individual credibility.[106] Nevertheless, some courts hold that testimony that the victim suffers from RTS or PTSD does not imply that the expert believes that the victim was raped.[107] When the state seeks to introduce this type of testimony, the expert describes the actual victim's symptoms but refrains from giving any opinion regarding the traumatic source of those symptoms.[108] In order to admit testimony of this type, the state's expert must have examined the victim before trial or treated the victim subsequent to the assault.[109]

For example, in *State v. McQuillen*, the Supreme Court of

rape. *See id.* According to the court, since the term RTS itself connotes rape, "[it] should not be utilized as the instrument to establish the guilt or innocence of one accused of rape." *Id.* at 241.

103. *Id.*

104. *Id.*; *see also* State v. Jensen, 432 N.W.2d 913, 920-21 (Wis. 1988) (allowing expert testimony to describe the victim's behavior and the behavior of victims of the same type of crime); Simmons v. State, 504 N.E.2d 575, 579 (Ind. 1987) (permitting expert testimony tending to show that the victim's post-rape behavior was consistent with the clinically observed behavior pattern known as "rape trauma syndrome"); State v. McQuillen, 689 P.2d. 822, 829 (Kan. 1984) (allowing expert to testify that the victim does possess and exhibit the emotional and psychological responses consistent with rape trauma syndrome). *But see* State v. McGee, 324 N.W.2d 232 (Minn. 1982) (following its reasoning set forth in *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982), the Supreme Court of Minnesota reversed a rape conviction where expert was permitted to testify that the victim suffered from symptoms consistent with rape trauma syndrome).

105. *See* Fischer, *supra* note 5, at 722-24.

106. *See id.*

107. *See id.*

108. *See id.* at 722-23.

109. *See id.* at 720.

Kansas, in reaffirming its holding in *State v. Marks*,[110] held that while an expert must refrain from offering a statement that the victim was raped, he may nevertheless testify that she has been diagnosed with rape trauma syndrome.[111] According to the court, the existence of RTS is relevant and admissible, so long as the prosecution's expert refrains from expressing an opinion that the underlying source of trauma leading to the syndrome was in fact rape.[112]

More recently, in rejecting the assumptions that jurors would be awed by an "aura of infallibility," the Supreme Court of New Mexico in *State v. Alberico* accepted that victims of sexual abuse may exhibit identifiable symptoms and declared that a "PTSD diagnosis is no different from any other method or technique" that is grounded in basic behaviorial psychology.[113] Though it acknowledged the self-referential and inconclusive aspects of a PTSD diagnosis, the court nevertheless concluded that a qualified expert may testify that the alleged victim exhibits symptoms of PTSD consistent with rape or sexual abuse.[114]

As discussed at length in Part IV, diagnostic expert testimony must be admitted with extreme care because a treating clinician is generally focused on psychological therapy and recovery, rather than victim credibility.[115] That is, she is primarily concerned with treating the victim's symptoms to facilitate recovery rather than probing for inconsistencies in search of the truth.[116] As a result, a treating clinician may have natural professional biases that run counter to the objective fact-finding function of the legal system.[117] Primarily for this reason, many courts have limited this kind of testimony in favor of a generalized description of a hypothetical RTS victim without reference to a particular complainant.

Perhaps the least reliable and most prejudicial testimony proffered by the state is presented when an expert testifies that the victim's RTS diagnosis was in fact precipitated by a rape.[118] Nevertheless, the court in *State v. Allewalt*[119] has allowed the prosecution's expert to testify not only about the victim's

110. 647 P.2d 1292 (Kan. 1982).
111. State v. McQuillen, 689 P.2d. 822, 830 (Kan. 1984).
112. *See id.* at 829.
113. 861 P.2d 192, 209 (N.M. 1993).
114. *See id.* at 210.
115. *See* Fischer, *supra* note 5, at 720.
116. *See id.*
117. *See id.*
118. *See* State v. McQuillen, 689 P.2d. 822, 828-29 (Kan. 1984) (distinguishing inadmissible testimony which identifies rape as the underlying source of trauma as an impermissible comment on victim credibility).
119. 517 A.2d 741 (Md. 1986).

particularized PTSD diagnosis, but also permitted the expert to assert that forcible rape was the traumatic event underlying the diagnosis.[120] In *Allewalt*, Maryland's highest court allowed this testimony on the theory that PTSD was like medical testimony which could permissibly include medical conclusions and information received from patients that provide a basis for these conclusions.[121] In rejecting the defendant's argument that PTSD evidence is not accepted in the relevant scientific community as a reliable means of identifying the underlying trauma,[122] the court noted that the expert refrained from using the terminology "rape trauma syndrome," which reduced the concern for unfair prejudice and the likelihood that the syndrome would be exclusively equated with rape.[123] While the court acknowledged that PTSD could result from a number of stressful situations, it nevertheless sanctioned the admissibility of testimony that rape caused the victim's PTSD.[124] Consequently, if an expert is qualified, that is if she possesses the requisite knowledge and experience and is able to diagnose the characteristic symptoms of a disorder, she may also testify regarding the underlying cause of that disorder.[125]

Similarly, the court in *State v. Alberico* recognized that "there are no certainties in science" and refused to admit expert testimony that the victim's PTSD symptoms were in fact caused by sexual abuse.[126] However, the court concluded that since different stressors manifest

120. *Id.* at 744.

121. *Id.* at 748-51; *cf.* State v. Moran, 728 P.2d 248, 254-55 & nn.6-8 (Ariz. 1986) (distinguishing expert opinion based on psychological evaluation from medical testimony rooted in objectively verifiable physical facts).

122. *See Allewalt*, 517 A.2d at 748. According to the court:

> That argument is like saying a medical diagnosis of a broken bone is not accepted in the relevant scientific community as a reliable means of identifying the underlying trauma (or disease) which caused the break. The appropriate inquiry in the present case is whether there is some policy applicable to evidence offered in rebuttal of consent in a rape case which prevents a qualified psychiatric witness from expressing an opinion, based on the patient's history, as to the cause of a recognized disorder, PTSD, from which, in the expert's opinion, the patient suffers.

Id.

123. *Id.* at 751.

124. *See id.* at 747-48.

125. *See generally id.* at 747-51. Significantly, the expert was careful to point out under cross-examination that severe trauma other than rape can lead to a diagnosis of PTSD and thus avoided expressing an opinion on the victim's credibility. *See id.* at 744. Other courts have declined to adopt this reasoning and have excluded diagnostic testimony on the theory that to do so would create an impermissibly prejudicial inference that the victim was in fact raped. *See* State v. Taylor, 663 S.W.2d 235, 241 (Mo. 1984) (en banc).

126. 861 P.2d 192, 212 (N.M. 1993) (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993)).

themselves in different symptoms, psychologists could isolate the precise cause of a victim's PTSD.[127] Thus, according to the court in *Alberico*, a qualified mental health professional may testify that the alleged victim suffers from PTSD and that her symptoms are consistent with those suffered by someone who has been raped.[128]

Diagnostic testimony strains evidentiary boundaries of admissibility and is tolerated by only a very small minority of courts. A proffer of testimony that rape is the underlying source of trauma in an RTS diagnosis is essentially indistinguishable from an opinion that the victim was in fact raped. Such an assertion not only constitutes an impermissible judgment on victim credibility, but also creates a highly prejudicial aura of certainty that the accused committed rape.[129] Consequently, in admitting this type of testimony, the courts in *Allewalt* and *Alberico* may be sanctioning lower courts' invasion of the province of the trier of fact. Moreover, as will be argued in detail in Part IV, many social scientists agree that it is virtually impossible to conclusively determine that rape, rather than some other traumatic event, precipitated the onset of PTSD symptoms. As such, this narrow range of expert testimony is arguably scientifically invalid, and its admissibility should be severely restricted, if not banned.

To summarize, courts that permit expert testimony of the victim's RTS or PTSD diagnosis reason that such evidence is helpful to the fact-finder in deciding the issue of consent because knowledge of typical post-rape behavior is beyond the ken of the jury.[130] These courts have determined that the social science supporting RTS diagnoses is sufficiently valid to justify admissibility and is not unduly prejudicial to the accused.[131] So long as the expert refrains from opining either explicitly or implicitly that an RTS diagnosis conclusively proves that the victim was raped, RTS testimony falls within permissible evidentiary boundaries.[132]

III. Rape Trauma Syndrome Testimony Proffered by the Accused

Though predominantly employed against the accused, the

127. *See id.* at 209.

128. *See id.* at 213-14.

129. Notably, however, the court in *Allewalt* contended that the propensity for unfair prejudice would be eradicated by liberal cross-examination and proper jury instructions. *Allewalt*, 517 A.2d at 751. With these tools, "the trial court can prevent any impression that the psychiatric opinion is like a chemical reaction." *Id.*

130. *See id.* at 748.

131. *See* Fischer, *supra* note 5, at 724.

132. *See id.*

probative value of RTS is theoretically available to any party.[133] In light of the pervasive prosecutorial use of RTS evidence to bolster conviction rates in cases where the defense is consent, it comes as no surprise that defendants have begun to demand the right to present RTS evidence as well. RTS testimony becomes relevant for the prosecution when the victim's post-rape behavior is consistent with that of other rape victims suffering from RTS, or when the victim is actually diagnosed with RTS or PTSD. It follows then that this type of evidence becomes logically relevant for the accused when the alleged victim is asymptomatic or her behavior is inconsistent with the post-rape behavior typical of other victims of rape who suffer from RTS or rape-related PTSD.[134] Moreover, as discussed in Part IV, this type of testimony becomes increasingly relevant for the accused when there is a possibility that the victim's PTSD diagnosis is attributable to a traumatic event that occurred before the alleged rape.[135] Consequently, the defendant may attempt to compel an adverse psychological examination in order to prove that the RTS diagnosis is not necessarily attributable to the rape for which he is accused. Rather, the accused will contend that the victim's symptoms may be a manifestation of a behavioral stress response attributable to an earlier traumatic event such as a prior rape, sexual assault, or other nonsexual trauma.[136] Such unbridled use of RTS by the accused substantially undermines legitimate interests of the victim and the state social policy embodied in protective rape shield laws.

Applying traditional rules of admissibility, when the prosecution opens the door by initially introducing RTS testimony, the defendant will almost certainly be permitted the use of such evidence.[137] Indeed, invoking principles of adversarial fairness, core constitutional values, and general rules of evidence, some courts have sanctioned the use RTS evidence proffered by the accused to rebut the same.[138] Arguably, in the absence of an initial prosecutorial proffer of RTS testimony, the privacy interests of the victim substantially outweigh the defendant's need to rebut, rendering such testimony insufficiently

133. *See* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.5, at 412.

134. *See id.* at 412-13.

135. *See* Stefan, *supra* note 11, at 1324-27.

136. *See id.*; *see also* Clarke, *supra* note 9, at 259. According to Clarke:

> Recent studies suggest that the impact of rape may be so profound because the rape actually causes physical changes in the woman, not just psychological or emotional ones. Rape (and other stressors that cause PTSDs) may change the brain's chemistry. . . . Because of these changes, a victim of rape may never again be the same biologically.

Id.

137. *See* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.5, at 413.

138. *See, e.g.*, State v. Wheeler, 602 N.E.2d 826, 833 (Ill. 1992).

relevant to justify its admission. However, at least one state supreme court has rejected this distinction, opting instead to confer upon the accused unrestricted power to employ RTS evidence, even when the prosecution has declined to do so first.[139] The following analysis explores state decisional law confronting defense-sponsored RTS evidence and describes judicial justifications in favor of admissibility.

A. *State v. McQuillen*

In *State v. McQuillen*, the Kansas Supreme Court reaffirmed its earlier holding in *State v. Marks*[140] that "[w]hen consent is the defense in a prosecution for rape, qualified expert psychiatric testimony regarding *the existence* of 'rape trauma syndrome' is relevant and admissible."[141] Accordingly, the state's expert may testify that the victim suffers from RTS or that she exhibits emotional and psychological responses consistent with an RTS diagnosis.[142] Distinguishing RTS evidence offered by the accused, the court recognized that in order for the defendant to proffer "negative evidence" of RTS, such evidence must have sufficient probative value.[143] The court further determined that where the prosecution has not first introduced testimony of the existence of RTS, evidence of its nonexistence has no probative value and is inadmissible.[144] However, where the prosecution first raises the issue and opens the door by a proffer of RTS, syndrome evidence becomes sufficiently probative such that the accused can assert the absence of RTS in support of his defense of consent.

Though beyond the scope of the express holding, the logical extension of the court's reasoning dictates that if the state elects to introduce RTS evidence based on a particularized diagnosis obtained from a psychiatric examination, the defendant must be permitted to compel the victim to submit to an adverse examination by his own expert. In order to proffer this type of diagnostic testimony, the state's expert generally must examine the victim before trial. The *McQuillen* court conceded that the defendant must be permitted to

139. *See* Henson v. State, 535 N.E.2d 1189, 1194 (Ind. 1989).
140. 647 P.2d 1292 (Kan. 1982).
141. State v. McQuillen, 689 P.2d. 822, 829 (Kan. 1984).
142. *See id.* at 827-30.
143. *Id.* at 830.
144. *See id.* According to the court:

> There are no statistics to show that there is any value to a negative finding that the rape trauma syndrome is not exhibited by the alleged victim. Negative evidence to be admissible must have some probative value. Where consent is the defense in a prosecution for rape, expert testimony of the absence of the rape trauma syndrome is not relevant or admissible.

Id.

cross-examine the state's expert in order to challenge his diagnostic methods and conclusions, and to have his own expert testify that the woman does not suffer from RTS.[145] Implicit in the court's reasoning is the recognition that when the prosecution elects to introduce diagnostic testimony based on victim examination, the defendant could successfully claim a right to have his own expert examine the victim in order to refute the state's diagnosis.[146] Indeed, the court in *McQuillen* recognized that once the state introduced evidence that the victim was suffering from a stress similar to RTS, the defendant had to be given the opportunity to establish that she was *not* suffering from such stress.[147] In finding that the trial court incorrectly concluded that the admission of defense-sponsored RTS testimony would violate rape shield laws, the court further observed that the Kansas rape shield statute was not an absolute prohibition against the defendant presenting evidence of the complaining witness's prior sexual conduct.[148] Nor did the statute prohibit the prosecuting attorney from introducing evidence of the victim's prior sexual conduct.[149]

B. *State v. Allewalt*

In *State v. Allewalt*, Maryland's highest court permitted the prosecution's expert witness to testify that forcible rape was the traumatic event that precipitated the victim's PTSD diagnosis.[150] Based upon a standard psychiatric examination and the victim's

145. *Id.*

146. *See id.* In *McQuillen*, the court concluded that the accused must be permitted to admit evidence of the victim's past sexual conduct to the extent the state relies on the same in its case-in-chief. *Id.* On this reasoning, the accused could conduct searching cross-examinations of the victim and state's expert as a ploy to parade before the jury explicit details of the victim's past sexual history. *See id.* at 835 (Schroeder, J., dissenting). Alternatively, in recognizing the right of the accused to examine the victim where the state has done so first, the court implicitly condoned compelled adverse psychiatric examinations to challenge the state's proffer of RTS evidence. *See id.* at 827.

147. *Id.* ("[T]o ensure a fair trial for the defendant, the defendant's expert had to complete his evaluation in order to determine if the victim was or was not suffering the rape trauma syndrome.").

148. *See id.* at 830 (reasoning that defense-sponsored use of RTS is limited by principles of relevance, the court nevertheless conceded that the accused may bring his own expert witness to rebut the presence of RTS and implied that a searching inquiry into the victim's sexual past may be justified where the state renders it relevant through its initial diagnosis).

149. *See id.* Anticipating the consequences that flow from prosecutorial use of RTS evidence, Justice Herd cautioned that "[t]he argument that admitting evidence of rape trauma syndrome would nullify the rape shield statute . . . is certainly a possibility which the prosecutor would need to take into consideration in planning his trial tactics in cooperation with the victim." *Id.* at 831 (Herd, J., concurring).

150. 517 A.2d 741, 744 (Md. 1986).

personal history, the state's expert testified that he believed the victim suffered from the recognized mental disorder PTSD.[151] Acknowledging that "almost any trauma" could cause PTSD, even those that were not life threatening, the expert nevertheless opined that forcible rape was the underlying cause of the victim's PTSD.[152] Thus, despite convincing evidence that the specific trauma underlying a PTSD diagnosis cannot be conclusively determined,[153] the court ruled that there exists no policy applicable to evidence offered in rebuttal to a defense of consent which prevents a qualified psychiatric witness from expressing an opinion as to a PTSD diagnosis of the victim *as well as* the underlying cause of such a recognized disorder.[154]

Although the decision of this case was based on the prosecutorial use of rape-related PTSD, *Allewalt* is significant for the potential defense use of PTSD as well. In fact, the court noted in its opinion that a trial court's decision to admit diagnostic PTSD testimony necessarily carries with it far reaching consequences.[155] Specifically, the court acknowledged that its reasoning could not only lead to cross-examination of the expert about PTSD generally, but also probing questioning directed at the victim about possible causes of the disorder other than the assault charged in the criminal case.[156] Recognizing the scope of its decision, the court declared that, "we can foresee cases where the defendant will seek to counter the State's PTSD evidence with its own expert testimony... [including] compulsory psychiatric examination of the complainant by an expert for the defense."[157]

151. *See id.*

152. *Id.* Under cross-examination the expert stated that he knew of at least one case where a patient's unjustified arrest for shoplifting had precipitated PTSD, and that while a slow marital breakup is not sufficiently stressful and sudden to give rise to a PTSD diagnosis, any direct sudden shock such as finding one's spouse in bed with another or coming home and finding the furniture gone is sufficiently traumatic to produce the disorder. *See id.* However, the expert did concede that his opinion was based on the fact that rape was the only significant trauma the victim reported to him. *See id.*

153. According to the court, since the expert refrained from using the term "rape trauma syndrome" and recognized that alternative trauma other than rape can lead to the development of PTSD, the testimony was not overly prejudicial to the accused. *See id.* at 751.

154. *See id.* at 748-51.

155. *See id.* at 751.

156. *See id.* Indeed, the court recognized that its ruling "necessarily carries certain baggage with it," and observed that "[l]urking in the background is the nice question of whether the absence of PTSD is provable by the accused in defense of a rape charge, as tending to prove that there was consent." *Id.*

157. *Id.*

C. *State v. Wheeler*

What was implicit in *Allewalt* and *McQuillen* became the express holding of the court in *State v. Wheeler.* In *Wheeler,* the Supreme Court of Illinois considered whether a defendant in a rape trial should have been permitted to compel an examination of the victim in an effort to establish the absence of RTS.[158] The prosecution's expert, a psychotherapist, had determined based on a single interview that the victim had symptoms consistent with RTS.[159] The defendant contended that under the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, he was constitutionally guaranteed the opportunity to have his own expert examine the victim to determine whether she suffered from RTS.[160] The court began by noting that in order to ensure a fundamentally fair trial, the Constitution requires that the accused be able to present witnesses in his own defense.[161] While the defendant was not precluded from presenting his own witnesses, his expert was precluded from personally examining the victim.[162] However, arguably, without the opportunity to examine the victim, the basis upon which the defense expert could form a rebuttal opinion was substantially circumscribed. Thus, the central issue before the court was whether the Due Process Clause of the Constitution *requires* that the defendant be permitted to compel an adverse examination to adequately defend against a criminal charge of rape when the prosecution bases its claim of nonconsent on an examination of the victim, and consequently, whether the denial of that right deprives the accused of a fundamentally fair trial.

The state protested that the defendant's rights are adequately honored when his expert is restricted to forming an opinion about the victim's condition based only on the observation of trial testimony and the analysis of written reports.[163] However, the supreme court disagreed, stressing the inherent qualitative differences between

158. State v. Wheeler, 602 N.E.2d 826, 830 (Ill. 1992). Prior to trial, defendant learned that the state intended to introduce expert testimony diagnosing the victim as suffering from RTS. *See id.* at 828. To refute the state's proffer of RTS evidence, the accused sought a motion to compel his alleged victim to submit to an examination by his own expert. *See id.*

159. *See id.* at 829.

160. *See id.* at 830.

161. *See id.*

162. *See id.*

163. *See id.* at 832. On this reasoning, because the defendant was not completely prevented from offering evidence that the victim did not suffer from RTS, application of the state law precluding a defense-compelled examination did not deprive him of a fair trial. *See id.*

testimony from an examining and nonexamining expert.[164] According to the court, "[w]hile it may be possible for an expert to form an opinion regarding rape trauma syndrome based only on a review of reports and trial testimony, this is clearly not the preferred method."[165] Indeed, the value of a personal examination is greatly enhanced to the extent the examining expert bases a diagnosis on observations of nonverbal factors and subjective interpretations of patient responses.[166] Consequently, "[a]n expert who has personally examined a victim is in a better position to render an opinion than is an expert who has not done so."[167] Furthermore, it is extremely difficult to effectively rebut a prosecutorial RTS diagnosis with generalized consistency testimony alone. Consequently, the court posited that notwithstanding the intended protection of the state's rape shield law, the prosecution's election to use RTS testimony as substantive evidence to prove that a rape occurred constituted a powerful reason to permit the accused to compel the victim to submit to a psychiatric examination.[168] The court recognized that past defendants have intentionally used examinations to harass and intimidate victims of rape, but contended nevertheless, that "we must balance the victim's rights to be free from intrusion with the defendant's constitutional rights to a fair trial."[169] By subjecting the victim to a compelled psychiatric examination, the accused does not necessarily violate the privacy interests protected by the state rape shield law.[170] Rather, according to the court, the accused was merely

164. *See id.*

165. *Id.*

166. *See id.*

167. *Id.* (citing Fischer, *supra* note 5, at 733 n.320).

168. *See id.* at 833. In recognizing the need to protect the privacy of sexual assault victims, the court nevertheless concluded that:

> Because the State in this case had the exclusive right to examine [the victim], the credibility of its expert was elevated above that of any nonexamining expert defendant could call. Thus, we find it is fundamentally unfair that the State was able to present the testimony of an examining expert but the defendant was limited to the testimony of a nonexamining expert.

Id.

169. *Id.* "'[A] State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained.'" *Id.* (quoting Ake v. Oklahoma, 470 U.S. 68, 79 (1985)).

170. *See id.* at 831-32. The state rape shield law provides, in pertinent part, that "no court may require or order a witness who is the victim of an alleged sex offense to submit to or undergo either a psychiatric or psychological examination." *Id.* at 830. The court observed that the state rape shield legislation was intended to eliminate the defense practice of intimidating sex offense victims through psychological examinations focusing on their competence and credibility as a witness. *See id.* However, the defendant was not seeking to undermine victim credibility or competence; rather, he was merely attempting to refute RTS testimony proffered by the state as evidence that a sexual assault occurred.

attempting to preserve his constitutional right to a fair trial by countering the state's RTS evidence through his own psychological examination.[171]

Ultimately, the court issued its ambitious departure and declared that "unless the victim consents to an examination by an expert chosen by the defendant, the State may not introduce testimony from an *examining* expert that the victim of an alleged sexual assault suffers from a 'recognized and accepted form of post-traumatic stress syndrome.'"[172] Consequently, where the victim in a rape prosecution refuses to submit to an adverse examination, the state may not introduce evidence of RTS through an examining expert. Where, however, the victim agrees to submit to an examination by an expert chosen by the accused, the state may introduce diagnostic RTS testimony to prove nonconsent. At base, the court held that whenever the prosecution introduces RTS evidence through testimony of an examining expert, the defense must be permitted to compel an examination of the victim as well.[173] If the victim refuses to submit to an examination, *both* the defendant and the state will be restricted to the use of generalized testimony submitted by nonexamining experts.[174]

D. *Henson v. State*

Expanding the evidentiary boundaries of defense-sponsored RTS evidence, the court in *Henson v. State* sanctioned the unrestricted power of the accused to initiate the use of RTS evidence to prove a

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See id. at 831. Thus, according to the court, where the accused seeks to rebut substantive evidence proffered by state, the protective policies underlying rape shield legislation are not violated.

171. *See id.* at 831-32. The court ultimately conceded that because the accused was denied the opportunity to counter the state's evidence with evidence of a substantially equal quality, he was deprived a fair trial. *See id.* at 833-34. Describing the fundamental aspects of our adversary system the court recognized that:

> "'The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.'"

Id. at 832 (quoting United States v. Nobles, 422 U.S. 225, 230-31 (1975) (quoting United States v. Nixon, 418 U.S. 683, 709 (1974))).

172. *Id.* at 833 (citation omitted).

173. *See id.*

174. The court emphasized that the victim may exercise her right to refuse a defense-compelled examination, which would foreclose the state's ability to proffer diagnostic testimony. *See id.* Consequently, the victim, in theory, retains control over the scope of RTS evidence proffered by the state.

defense of consent.[175] In *Henson,* the Indiana Supreme Court considered whether the defendant in a rape trial should be permitted to use RTS testimony in a case where the prosecution had declined to introduce it first.[176] The court, refusing to distinguish cases where the state has not first opened the door, concluded that defense-sponsored RTS testimony is admissible.[177] According to the majority, the court below erred in excluding defense expert testimony that the victim's conduct, after the alleged rape, was inconsistent with that of a person who has suffered a traumatic forcible rape.[178] Emphasizing that its jurisdiction had already recognized the admissibility of RTS, the court reasoned that since it had previously crossed the scientific reliability hurdle, "[i]t would [now] be fundamentally unfair to allow the use of such testimony by the State . . . and then deny its use by a defendant here."[179] In support of its holding, the court declared that to deny the defendant the opportunity to present syndrome evidence impinged upon the substantial rights of the accused to present a complete defense.[180]

In *Henson,* the defendant's expert had never personally consulted with the complainant and had no first hand knowledge of the alleged rape.[181] Rather, the expert merely testified through general observation of the victim's behavior (of which there was evidence from previous testimony) that her post-rape conduct was inconsistent with that of a hypothetical victim who had suffered a traumatic rape similar to the one described at trial.[182] The court based its decision in part on an earlier case upholding the admissibility of prosecutorial consistency testimony.[183] In *Simmons v. State,* the Indiana Supreme Court admitted expert testimony which concluded that the victim's inability to recall certain events was consistent with clinically observed patterns of behavior.[184] The court in *Simmons* reasoned that such testimony was unobjectionable because it tended to show that the victim had suffered a rape and was not a direct opinion of whether the victim was telling the truth.[185]

Extending this reasoning to defense-sponsored evidence, the *Henson* court recognized that while the expert opinion offered by the

175. 535 N.E.2d 1189 (Ind. 1989).
176. *Id.* at 1191.
177. *See id.* at 1193-94.
178. *See id.* at 1192-94.
179. *Id.* at 1193.
180. *See id.* at 1194.
181. *Id.* at 1193.
182. *See id.*
183. *See id.*
184. 504 N.E.2d 575, 578-79 (Ind. 1987).
185. *Id.* at 579.

accused might undermine the victim's credibility by tending to show that she had not suffered a rape, it did not do so in an impermissibly direct manner.[186] "All testimony which contradicts one party's version of a set of events raises questions about that party's credibility; however, that does not make the testimony inadmissible."[187] Indeed, had the court concluded otherwise, the accused "would be hard pressed to ever present any sort of defense in his own behalf since the core of any defense usually involves a denial that the alleged criminal conduct occurred."[188] According to the court, to deny the defendant the right to use RTS as probative that a rape did not occur when he asserts a defense of consent, would be to deprive him of his right to present a complete defense as required by the Constitution.[189] Consequently, while sanctioning defense-sponsored RTS testimony implicates closely guarded privacy interests of rape victims, the court implied that such an intrusion is justified in light of the defendant's Sixth Amendment guarantees.

IV. Quest for Empirical Truth

As described above, courts rely upon principles of adversarial fairness, core constitutional values, and rules of evidence to support the contention that absent countervailing concerns, the accused must be permitted to employ RTS evidence to rebut the state's use of the same. Once the prosecution opens the door to RTS evidence, a woman's sexual past is rendered logically relevant for the accused. Moreover, as this Part will show, weaknesses inherent in the scientific research underlying RTS and rape-related PTSD render syndrome evidence highly relevant in a rape prosecution.[190] Even commentators in favor of prosecutorial use of RTS testimony recognize that problems associated with the self-referential aspects of a PTSD or RTS diagnosis, the inability to sufficiently distinguish rape induced PTSD from nonrape-related symptoms, and lifetime prevalence rates plague the research.[191] In light of these empirical

186. 535 N.E.2d at 1192.

187. *Id.* at 1193.

188. *Id.*

189. *See id.* at 1194.

190. *See* Massaro, *supra* note 31, at 441 ("[P]roper cross-examination of an expert about a victim's RTS symptoms can elicit whether other explanations for the trauma symptoms exist.... For example, the defense could explore whether the victim had been raped or sexually assaulted before in her life, a sad but significant possibility."); *see also* Patricia Frazier & Eugene Borgida, *Rape Trauma Syndrome Evidence in Court*, 40 AM. PSYCHOLOGIST 984, 991-92 (1985) (observing that courtroom use of rape trauma syndrome may open door to explorations by the accused of the victim's emotional state of mind in months prior to the rape).

191. *See* Stefan, *supra* note 11, at 1324-27 (describing case where the court reasoned

shortcomings, the probative value of defense-sponsored RTS evidence begins to outweigh the privacy interests of the victim.

Though a substantial body of research has been conducted, many scientists acknowledge that the methodology underlying RTS is imprecise, and the results inconclusive.[192] First, there exists considerable disagreement regarding the range of events that can precipitate the onset of PTSD.[193] Implicating several potential sources of trauma, the DSM-IV diagnostic criteria provide that PTSD is characterized by the:

> development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.[194]

The victim's initial reaction must include "intense fear, helplessness, or horror" and result in symptoms lasting more than one month that include persistent reexperiencing of the traumatic event, persistent avoidance or numbing in response to stimuli associated with the traumatic event, and increased hypervigilance.[195] Although these criteria appear to be definitive, scientists disagree about the precise nature and range of trauma capable of producing a PTSD response.[196] While the more extreme traumas (war, torture, natural disaster) easily meet the diagnostic criteria for "'actual or threatened death or serious injury' ... science has not yet developed techniques for judging and classifying other, more ambiguous events."[197] Consequently, sudden shocking events such as a severe automobile accident, witnessing spousal infidelity, and prior rape or child abuse, while not extraordinary life events, can arguably lead to the development of PTSD.[198] Indeed, some scientists contend that even

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that once the prosecutor introduced RTS evidence, the accused was entitled to rebut with rumors of affairs and prior sexual conduct to provide an alternative explanation for the victim's hysteria and concern about pregnancy); *see also* Frazier & Borgida, *supra* note 45, § 10-2.2.1, at 421.

192. *See* Norman Poythress & Christopher Slobogin, *The Scientific Status of Reserach on Insanity and Diminished Capacity*, *in* 1 MODERN SCIENTIFIC EVIDENCE, *supra* note 45, § 6-2.4.2, at 237, 264-65 & n.163.

193. *See id.* at 265.

194. DSM-IV, *supra* note 4, at 424.

195. Poythress & Slobogin, *supra* note 192, § 6-2.4.1, at 261.

196. *See id.* § 6-2.4.2, at 265 & n.163.

197. *Id.* at 265 (citation omitted).

198. *See* DSM-IV, *supra* note 4, at 424; *see also* State v. Allewalt, 517 A.2d 741, 744 (Md. 1986).

seemingly benign, less extreme traumatic events such as a victim's intense subjective fear about working in an asbestos-ridden building or of the effects of long-term exposure to second-hand smoke can precipitate PTSD.[199] Thus, nonsexual trauma experienced by a victim earlier in her life may constitute a sufficiently imminent physical threat to bring on PTSD.

Similarly, prior rape or sexual trauma may trigger responses indistinguishable from those attributable to RTS. It is an unfortunately common experience that a significant number of rape victims have been raped in the past.[200] Many victims of prior rape remain symptomatic for years after the initial attack.[201] Research indicates that four to six years after a rape, twenty-six percent of victims have not recovered from or adjusted to the previous assault.[202] Perhaps more significantly, RTS symptoms may be caused by a stressful sexual experience other than forcible rape. Symptoms associated with RTS may be exhibited by a woman who did not subjectively consent to intercourse, but who perhaps did not resist because she was afraid or confused or felt she had no choice.[203] Thus, a woman who truly believes that she was raped, when in fact she outwardly consented, may develop RTS.[204] Moreover, many women

199. Poythress & Slobogin, *supra* note 192, § 6-2.4.2, at 265.

200. *See* Ruch and Hennessy, *Sexual Assault: Victim and Attack Dimensions*, 7 VICTIMOLOGY 94, 103 (1982) (describing the frequency of multiple rapes, the authors noted that 17% of subjects were victims of earlier sexual assault); *see also* Patricia Frazier & Eugene Borgida, *Juror Common Understanding and the Admissibility of Rape Trauma Syndrome in Court*, 12 LAW & HUM. BEH. 101, 109 (1988) (discussing that estimates of the frequency of multiple rape experiences have varied from 17% to over 60% across studies).

201. *See* Waddle & Parts, *supra* note 20, at 403-04.

202. *See id.* at 403 (citing ANN WOLBERT BURGESS & LYNDA LYTLE HOLMSTROM, RAPE: CRISIS & RECOVERY 407-48 (1979)).

203. *See* Stefan, *supra* note 11, at 1326-27 (observing that at most, RTS evidence shows that a woman feels she has been sexually violated and asserting that "[e]ven if one accepts a link between a past traumatizing sexual event and current symptoms of rape trauma syndrome, it should be absolutely clear that this event is not necessarily what the law calls rape"). However, that the law refuses to recognize as rape, intercourse without force, does not diminish the resulting trauma women experience. *See id.* at 1326. "[T]he law's definition of rape is far more parsimonious than women's lived experience of rape as intercourse against their will. No court considering the admissibility of rape trauma syndrome has recognized the gulf between the nonconsent that makes a woman experience sex as rape, and the force and resistance that is required for the law to define it as rape." *Id.* at 1326-27 (citing Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1171 (1986); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 175-77 (1989)).

204. *See id.* at 1326 (noting that some scientific literature has determined that attempted rape causes RTS); *see also* Judith V. Becker et al., *The Effects of Sexual Assault on Rape and Attempted Rape Victims*, 7 VICTIMOLOGY 106, 112 (1982) (asserting that victims of rape and attempted rape may experience similar reactions).

victimized by a traumatizing attempted rape may be diagnosed with RTS or rape-related PTSD. Testifying in a 1990 case, Ann Burgess, who co-authored the first RTS study, recognized that nonconsensual sexual assault short of rape could cause rape trauma syndrome.[205] Because an RTS response could be attributable to prior rape, attempted rape, or even nonsexual trauma, a diagnosis cannot conclusively prove the absence of consent in a particular case.[206]

Finally, and perhaps most notably, PTSD symptoms can persist indefinitely throughout the victim's life. One study suggests that from twelve to seventeen percent of rape survivors continue to present PTSD responses several years post-rape.[207] This means that an RTS diagnosis does not necessarily indicate that the victim is responding to a recently experienced traumatic event. Rather, at the time of trial, a woman may exhibit symptoms of RTS attributable to a rape or nonsexual trauma that she suffered many years before. When lifetime prevalence rates are significant, an expert cannot conclusively determine that the rape with which the accused is charged, rather than a prior traumatic event, is the source of RTS symptomology.

At base, forcible rape is merely one of a number of traumatic events that can lead to the development of PTSD or an RTS response.[208] More significantly, symptoms presented by a rape survivor diagnosed with PTSD are not sufficiently distinguishable from those exhibited by a victim of a different trauma. "Although rape is clearly so traumatic that it usually leads to psychological injury, specific symptoms of such injury are not connected to sexual assaults through the diagnosis of PTSD. PTSD thus cannot distinguish between victims of rape and victims of other traumas."[209] Consequently, testifying experts cannot definitively conclude that

205. *See* Commonwealth v. Mamay, 553 N.E.2d 945, 951 (Mass. 1990).

206. *See* Waddle & Parts, *supra* note 20, at 403-04 (reasoning that because the presence of RTS could result from a prior rape, rather than the incident with which the accused is charged, it may not prove the absence of consent in a particular case).

207. *See* Frazier & Borgida, *supra* note 45, § 10-2.2.1, at 421.

208. *See* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.2.1, at 405.

209. *Id.* This, however, does not render the psychological evidence irrelevant. *See id.* at 406. Evidence that the victim has symptoms consistent with a diagnosis of RTS or PTSD is clearly relevant as tending to prove that a traumatic event occurred in cases where the defense is consent. Principles of relevance require only that evidence be probative, not dispositive. Accordingly, evidence of PTSD should not be discarded simply because an expert is unable to conclusively identify the precise underlying trauma. It is sufficient that the expert can testify that a victim displays psychological and somatic symptoms consistent with one who has suffered some severe trauma. *See id.* at 406; *see also* State v. Taylor, 663 S.W.2d 235, 240 (Mo. 1984) (en banc) ("It may not be gainsaid that the existence of psychological symptoms in a complainant which correspond to a traumatic stress reaction is probative of the issue of force, in the sense that it renders that fact more probable than it would have been without the evidence.").

rape, rather than some other sudden shocking event, precipitated the development of PTSD.[210] Indeed, RTS is a general term used to describe post-rape victim behavior; it is simply *not* a test for whether a rape occurred. So too, PTSD does not presume to be a "scientific technique" for identifying certain symptoms of sexual abuse.[211] Rather, it is a therapeutic model designed to promote the recognition of, and recovery from, behavioral responses associated with a traumatic experience.[212]

A second related concern involves the inherent reliability of RTS and its adaptability to the legal fact-finding context. Specifically, the driving forces behind RTS research methodology—therapy and recovery—may not provide a suitable basis for the objective determination of fact necessary in a criminal prosecution.[213] Expressing concern with the clinical origins of RTS research, some courts have refused to admit RTS as evidence of rape.[214] In distinguishing empirical from legal fact-finding, an insightful court in *People v. Bledsoe* recognized the divergent goals of law and science:

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210. *See* 1 FAIGMAN ET AL., *supra* note 3, § 10-1.2.1, at 405. This critique on the law's use of science is designed merely to flag potential areas of concern. Most researchers agree that these weaknesses are not sufficiently problematic to render RTS evidence inadmissible. *See id.* at 406. Rather, the description of RTS social science as applied to the legal fact-finding context is intended only to demonstrate that given empirical shortcomings, defense-sponsored RTS becomes even more relevant than it otherwise might have been. Thus, the probative value of RTS evidence proffered by the accused is substantially enhanced, such that the scales of relevance could ultimately tip in favor of the defendant's constitutional rights and outweigh the victim's privacy interests.

211. *Id.* § 10-1.3.3, at 412; *cf.* State v. Alberico, 861 P.2d 192, 210 (N.M. 1993) (characterizing a PTSD diagnosis as a valid scientific technique for identifying certain symptoms of sexual abuse).

212. *See* State v. Saldana, 324 N.W.2d 227, 229 (Minn. 1982) ("Rape trauma symdrome [sic] is not the type of scientific test that accurately and reliably determines whether a rape has occurred."); *cf. Alberico*, 861 P.2d at 208 (asserting that "PTSD is generally accepted by psychologists and psychiatrists as a valid technique for evaluating patients with mental disorders").

213. *See* Faigman, *supra* note 25, at 826. That is not to say that social science research findings systematically subjected to the rigors of the scientific method cannot be employed in the context of legal decision making. *Cf.* Morse, *supra* note 70 (challenging the assertion that only objectively verifiable evidence based on quantifiable studies can ever form the substance of social science expert testimony).

214. *See* State v. Rimmasch, 775 P.2d 388, 407 (Utah 1989). In *Rimmasch*, the court recognized that:

> It should not be surprising that those who undertake to treat persons who may have suffered sexual abuse have no peculiar competence to judge the credibility of their patients.... Working hypotheses relied upon by therapists may be useful for treatment purposes; however, that does not mean that they are reliable enough to be used for forensic purposes.

Id.; *see also Saldana*, 324 N.W.2d at 230 ("Rape trauma syndrome is not a fact-finding tool, but a therapeutic tool useful in counseling.").

> Unlike fingerprints, blood tests, lie detector tests, voiceprints or the battered child syndrome, *rape trauma syndrome was not devised to determine the "truth" or "accuracy" of a particular past event*—i.e., whether, in fact, a rape in the legal sense occurred—but rather was developed by professional rape counselors as a therapeutic tool, to help identify, predict and treat emotional problems experienced by the counselors' clients or patients.[215]

Furthermore, the court observed that the therapeutic nature of RTS research does not emphasize credibility, which is an essential concern in a criminal trial.[216] Thus, according to the California Supreme Court in *Bledsoe*:

> [A]s a rule, rape counselors do not probe inconsistencies in their clients' descriptions of the facts of the incident, nor do they conduct independent investigations to determine whether other evidence corroborates or contradicts their clients' renditions. *Because their function is to help their clients deal with the trauma they are experiencing, the historical accuracy of the clients' descriptions of the details of the traumatizing events is not vital in their task.* To our knowledge, all of the studies that have been conducted in this field to date have analyzed data that have been gathered through this counseling process and, as far as we are aware, none of the studies has attempted independently to verify the "truth" of the clients' recollections or to determine the legal implication of the clients' factual accounts.[217]

The very concerns, however, that are secondary to the therapist—credibility and the precise underlying source of trauma—are essential for the proper functioning of the fact-finder in the legal decision-making context. Indeed, a diagnosing therapist has no means of corroborating the patient's historical accounts. Most RTS diagnoses are predicated upon "direct symptom endorsement" by the victim and are therefore subject to manipulation.[218] Thus, there is a

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215. 681 P.2d 291, 300 (Cal. 1984) (emphasis added).

216. *See id.*

217. *Id.* (emphasis added); *see also* Faigman, *supra* note 25, at 820-21. In asserting that as consumers of syndrome evidence, courts should demand more accurate information, Professor Faigman has observed that:

> Although much of the syndrome work is borrowed from therapeutic practices, the standards in the therapeutic and legal contexts are entirely different. When used in the therapeutic process, syndrome work is not specifically concerned with legally relevant criteria, such as whether an alleged rape victim consented.... If judges do not expect and demand better science, the researchers will not provide it.

Id.

218. Poythress & Slobogin, *supra* note 192, § 6-2.4.1, at 262. Though the authors make this observation in the context of PTSD employed by the accused to support a defense of insanity, concerns about the self-referential aspects of PTSD are equally applicable in the context of RTS. When a psychologist diagnoses a victim with RTS or rape-related PTSD, she necessarily relies on the survivor's declaration that she was raped. Information on

fatal circularity to reasoning from a PTSD diagnosis to a finding that the traumatic experience in fact occurred because PTSD accepts as true, for the purposes of diagnosis, that the traumatic experience described by the victim happened as she said it did.[219]

That researchers in the scientific community may be unable to determine whether a woman diagnosed with RTS exhibits symptoms attributable to attempted rape or a prior sexual attack rather than the rape for which the defendant is charged is constitutionally problematic. Such empirical indeterminacy substantially undermines the integrity of the truth finding function in the legal context. It is difficult to justify categorical exclusion of defense-sponsored RTS when scientists are unable to conclusively determine the specific type of trauma that led to PTSD in a particular case. Indeed, methodological shortcomings inherent in RTS research render the ability of the accused to defend with RTS essential to a constitutionally complete defense. Consequently, when the accused is precluded from rebutting the state's particularized RTS evidence, he is denied the opportunity to present an essential element of a constitutional defense. In recognizing the evidentiary infirmities of RTS, courts must allow the accused to submit the state's proffer to the "crucible of adversarial testing" so central to our system's discovery of truth. As the next Part explains, it is only by subjecting RTS evidence to rigorous rebuttal and cross-examination that we can preserve the integrity of the fact-finding process, mitigate the uncertainty inherent in RTS, and strike a constitutional balance between legitimate state interests and the rights of the accused.

A. Unintended Consequences of Rape Trauma Syndrome Research

Evidentiary theories of relevance dictate that once the state proffers RTS evidence, the victim's sexual behavior becomes relevant to the accused. Similarly, since science cannot conclusively exclude alternative sources of trauma underlying RTS symptoms, a woman's past sexual history is relevant to a constitutionally complete defense. Invoking principles of adversarial fairness, constitutional balance, and fact-finding integrity, courts will increasingly admit RTS evidence proffered by the accused. Recognizing the probative value of RTS

symptoms and functioning is obtained almost exclusively through self-reporting or from questionnaires or personal interviews, rather than through a more objective method. *See* Frazier & Borgida, *supra* note 45, § 10-2.1.2, at 416. If an examining expert observes PTSD symptoms, and rape is the only account of recent trauma the victim relates, then she may rely on this self-referential account to determine the underlying trauma without regard to possible earlier traumatic events which the victim may have suffered.

219. Frazier & Borgida, *supra* note 45, § 10-2.1.2, at 416; *see also* Hutton v. Maryland, 663 A.2d 1289, 1300 (Md. 1995).

evidence, courts have reasoned that when the state introduces RTS to refute a defense of consent, the accused must be permitted to defend with the same.[220] At least one state supreme court has gone even further, concluding that fundamental fairness demands an opportunity for the accused to introduce sexual history evidence, even when the state has declined to do so first.[221]

However, a vexing dilemma arises when the accused seeks to use RTS evidence offensively against his alleged victim. Arguably, liberal admissibility of defense-sponsored RTS evidence unjustifiably compromises core values embodied in rape shield legislation. Driven by feminists and law enforcement advocates, 48 states and the federal government have enacted rape shield statutes designed to protect victims against the embarrassment, invasion of privacy, and sexual stereotyping endured by women who publicly prosecute rape.[222] Employed by defendants as a device to embarrass and humiliate victims, compelled examinations contributed to a substantial decrease in the reporting and successful prosecution of rape cases.[223] Fortunately, modern rape shield laws reformed these prejudicial practices by prohibiting compulsory exams and restricting inquiry into a woman's past sexual history.[224] By protecting victims of rape from the embarrassment, intimidation, and humiliation inherent in cross-examination and compulsory psychiatric exams, rape shield laws diminish institutional biases, preserve victim privacy, and facilitate the fair prosecution of rape trials.

However, the very research social scientists developed to overcome institutional biases endured by rape victims for decades is now being used by defendants to prevent those same victims from obtaining justice. Extending the reasoning of *Henson*, the accused could seek to unilaterally compel a psychiatric examination to establish: (1) the absence of RTS symptoms or appropriate post-rape behavior; or (2) that the presence of an RTS response is attributable to a prior sexual trauma, rather than the rape for which the defendant is accused.[225] RTS experts, even those sympathetic to its admissibility to aid victims, have conceded that if a woman has been raped before, or had a traumatic sexual event in the past, her prior sexual history becomes relevant for the accused.[226] It is not surprising then, that in sanctioning the right of the accused to compel victim examinations,

220. *See, e.g.*, People v. Wheeler, 602 N.E.2d 826, 833 (Ill. 1992).

221. *See, e.g.*, Henson v. State, 535 N.E.2d 1189, 1194 (Ind. 1989).

222. *See* Hazelton, *supra* note 14, at 35-36 & n.2.

223. *See* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 795-96 (1986).

224. *See* Waddle & Parts, *supra* note 20, at 411.

225. *See* Stefan, *supra* note 11, at 1324-27.

226. *See id.*

the court in *Wheeler* concluded that unless victims of rape agree to submit to an examination by an expert of the defendant's choice, the prosecution must be precluded from admitting particularized RTS testimony based on the victim's diagnosis.[227] Clearly, the resurrection of compelled victim examinations foreshadowed by recent decisional law, strikes at the heart of core rape shield values.[228]

In seeking to preserve rape shield protections, some commentators contend that the accused must be categorically precluded from relying on RTS to defend against the state's charge of rape.[229] Arguably, where the prosecution declines to initiate the introduction of RTS testimony, the victim's sexual behavior and past are insufficiently relevant to warrant admission. Survivors of rape tend to exhibit a vast range of behavior; some manifest few symptoms while others appear controlled and outwardly "asymptomatic." Accordingly, the absence of "typical" post-rape behavior is only marginally relevant to the accused. When balanced against legitimate rape shield objectives, negative RTS evidence is insufficiently relevant to justify admission by the accused.[230]

However, unqualified exclusion of defense-sponsored RTS evidence fails to comport with constitutional values of the Sixth Amendment. Due process and the Sixth Amendment provide that the accused in a criminal trial shall have a fair opportunity to present

227. *See* People v. Wheeler, 602 N.E.2d 826, 833 (Ill. 1992). This gives the victim a "choice" of submitting to a psychiatric examination by two probing experts on the one hand, and limiting the state's case to a generalized description of RTS symptoms and the less probative consistency testimony on the other. Arguably, such a result compromises the state's position, particularly in situations where there is little or no physical evidence and an RTS diagnosis is the strongest evidence of nonconsent available to the state. To avoid this potential problem, some courts have chosen to restrict the use of RTS to general consistency testimony without permitting either side to give particularized testimony based on examination of the victim. This approach has also won support in at least one state supreme court to have considered the admissibility of expert testimony concerning battered woman syndrome. *See* State v. Hennum, 441 N.W.2d 793, 799 (Minn. 1989) (holding that expert testimony regarding battered woman syndrome will be limited to a description of the general syndrome and reasoning that a restriction on diagnostic testimony will remove the need for compelled examinations of the accused). However, in the context of rape trauma syndrome, the systematic preclusion of the state's ability to introduce particularized diagnostic testimony can work a severe disadvantage to the prosecution where there is little or no physical evidence and the defense is consent. To foreclose this option would doom many cases at the outset. Thus, the prosecution should at least have the opportunity to present diagnostic testimony, though perhaps it comes at a high price. *See* State v. Maday, 507 N.W.2d 365, 372 (Wis. Ct. App. 1993).

228. *See* Stefan, *supra* note 11, at 1271; Hackman, *supra* note 10, at 453; Economou, *supra* note 11, at 1143.

229. *See, e.g.*, Economou, *supra* note 11.

230. *See* State v. Jones, 615 N.E.2d 713, 719 (Ohio Ct. App. 1992); State v. McQuillen, 689 P.2d 822, 830 (Kan. 1989); *but see* Henson v. State, 535 N.E.2d 1189, 1194 (Ind. 1989).

a complete evidence and to fully defend against the state's accusations. Absent countervailing concerns, privacy interests of the victim in a rape trial may be sufficient to substantially outweigh the Sixth Amendment rights of the accused to present a complete defense.[231] Indeed, the Supreme Court has recognized that legitimate state social policy can constitutionally justify precluding relevant evidence of the victim's prior sexual history with the accused.[232] Nevertheless, under some circumstances, such as when the prosecution introduces RTS evidence to refute a defense of consent, the scales of relevance begin to tip in favor of the constitutional rights of the accused.[233] In accordance with evidentiary theories of relevance, the prosecution can render the victim's past sexual history logically relevant to the accused by raising the RTS issue. Moreover, as discussed at length above, the methodology upon which the scientific conclusions of RTS are based lacks sufficient certainty to be dispositive. As a result, the victim's sexual past becomes theoretically and practically relevant for the defense. Consequently, when the state relies upon RTS evidence, core constitutional values and principles of adversarial fairness combine to require that the accused be permitted to present all the essential elements of his defense. In support of this conclusion, the following Part advances a method of balancing the legitimate social policy embodied in rape shield legislation with the constitutional rights of the accused, and proposes an evidentiary framework of admissibility when the accused seeks to offer RTS as part of his constitutionally required defense.

V. Constitutionally Balancing the Rights of the Accused

A. Rape Shield Law

Prior to the passage of modern rape shield protections, misguided conceptions about female sexuality combined with rules of character evidence to justify admission of a woman's sexual history to prove a defense of consent.[234] Generally, character or "propensity" evidence is inadmissible; however, a significant exception to the general rule provides that the accused may proffer a pertinent trait of his victim's character to show that she acted in conformity with that trait.[235] Common law applications of this exception mirrored long-established beliefs that a woman who once engaged in sexual

231. *See* Waddle & Parts, *supra* note 20, at 411-13.
232. *See* Michigan v. Lucas, 500 U.S. 145, 151 (1991).
233. *See* Waddle & Parts, *supra* note 20, at 413.
234. *See* Galvin, *supra* 223, at 777.
235. *See* FED. R. EVID. 404(a)(2).

relations outside the sanctity of marriage possessed the character for unchastity.[236] And, furthermore, that a sexually unchaste woman was more likely to have consented to sex with the accused. An oft cited rhetorical inquiry illustrates this dominant, yet not too distant, evidentiary paradigm. Distinguishing between a woman "who has already submitted herself to the lewd embraces of another, and the coy and modest female severely chaste and instinctively shuddering at the thought of impurity" an 1838 court inquired "[a]nd will you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia?"[237] On this reasoning, a man accused of rape was permitted to prove, and the jury could infer, that based on a woman's past sexual indiscretions, she probably consented to sex with him as well.[238]

Moreover, female accusers of sex crimes were characterized as incompetent to testify. Evidence law provides that the accused may proffer evidence bearing on the victim's character for truthfulness. A minority of common law courts relied upon this rule to conclude that unchaste character is relevant not only to the issue of consent, but to credibility as well.[239] Contending that female "promiscuity imports dishonesty," courts justified admission of a woman's sexual behavior based on the assumption that "a certain type of feminine character predisposes to imaginary or false charges of this sort."[240]

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236. *See* People v. Hastings, 390 N.E.2d 1273, 1277 (Ill. App. 1979); People v. Collins, 186 N.E.2d 30, 33 (Ill. 1962). The reasoning advanced by the court in *People v. Collins* provides an apt example.

> Since want of consent on the part of the complainant is of the essence of the crime of forcible rape . . . it is permissible, in order to show the probability of consent by the prosecutrix, that her general reputation for immorality and unchastity be shown. The underlying thought here is that it is more probable that an unchaste woman would assent to such an act than a virtuous woman.

Id.

237. People v. Abbot, 19 Wend. 192, 195 (N.Y. 1838).

238. Indeed, jury instructions regarding unchaste character admonished the finder of fact accordingly:

> Evidence was received for the purpose of showing that the female person named in the information was a woman of unchaste character. A woman of unchaste character can be the victim of forcible rape but it may be inferred that a woman who has previously consented to sexual intercourse would be more likely to consent again. Such evidence may be considered by you only for such bearing as it may have on the question of whether or not she gave her consent to the alleged sexual act and in judging her credibility.

CALJIC No. 10.06 (3d rev. ed 1970).

239. *See* Galvin, *supra* note 223, at 787.

240. 1 J. WIGMORE, WIGMORE ON EVIDENCE § 63, at 467 (3d ed. 1940); *see also* Virgin Islands v. John, 447 F.2d 69, 73 (3d Cir. 1971) (declaring that where the issue of consent is presented, evidence of the woman's reputation for chastity is of substantial probative value).

Significantly, the purported link between promiscuity and veracity was not adopted with respect to men, nor was it advanced with regard to female witnesses in nonsexual offense prosecutions.[241] To the contrary, a rape victim's credibility and competence were open to attack solely because of the sexual nature of the crime. These same evidentiary rules entitled a man accused of rape to subject his accuser to probing psychiatric examinations. Reflecting the pervasive suspicion cast upon rape victims of the past, Professor Wigmore recommended that probing examinations were necessary to determine whether the victim suffered from some "mental or moral delusion or tendency . . . causing distortion of the imagination in sex cases."[242] Thus, "in all charges of sex offenses, the complaining witness [should] be required to be examined before trial by competent psychiatrists for the purpose of ascertaining her probable credibility."[243]

Feminists in search of reform criticized these legal standards as perpetuating a cultural ideology fraught with distrust and contempt for the female accuser.[244] Cross-examinations conducted by the accused usually involved a searching inquiry into not only a woman's chastity but also intimate details of her life including her adulterous relationships, use of contraception, and illegitimate children.[245] The inquisitorial nature of rape trials and compelled psychiatric examinations deterred victims from reporting rape and ultimately resulted in the under-enforcement of criminal laws.[246] Moreover, prejudicial practices reinforced misconceptions among jurors who nullified legitimate rape law to punish women deemed to be morally undeserving.[247] Traditionally, juries attributed to the victim reasons for lying and fabricating the rape charge including vindictiveness, fear of being perceived as willingly sexual, and fear of pregnancy.[248] Thus, jurors often found sufficient fault with the woman to avoid punishing the rapist.[249]

Eventually, as societal beliefs shifted to a less Victorian model of female sexuality, chastity was rendered logically irrelevant and the common law paradigm could no longer be justified. Prompted by

241. *See* Galvin, *supra* note 223, at 787; *see also* State v. Sibley, 33 S.W. 167, 171 (Mo. 1895) (conceding that what "destroys the standing [of women] in all the walks of life has no effect whatever on the standing for truth" of men).

242. 3A J. WIGMORE, WIGMORE ON EVIDENCE § 924a, at 747 (Chadbourn rev. 1970).

243. *Id.*

244. *See* Galvin, *supra* note 223, at 791-93.

245. *See id.* at 794.

246. *See id.* at 795-96.

247. *See id.* at 800-01.

248. *See* Orenstein, *supra* note 9, at 675-76.

249. *See id.* at 673.

feminist reformers and proponents of law enforcement, all but two states and the federal government have enacted protective rape shield legislation.[250] While statutory provisions vary widely, all rape shield laws create a presumption of inadmissibility by restricting inquiry into a woman's past sexual behavior and character for chastity.[251] Federal Rule of Evidence 412 provides an apt illustration of the modern view. Rule 412, circumscribed only by express exceptions, renders sexual predisposition or behavior evidence absolutely inadmissible.[252] The prohibition excludes all forms of evidence including reputation and opinion testimony, and evidence of specific acts.[253] The exclusionary scope of Rule 412 is expansive insofar as it preempts other evidentiary rules that would support admissibility.[254] Consequently, as discussed below, a broad construction of rape shield prohibitions substantially diminishes the Sixth Amendment right of the accused to present exculpatory evidence.

B. Sixth Amendment

Firmly rooted in our constitutional values, the opportunity to be heard is an essential requirement of procedural fairness.[255] Whether located directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."[256] Indeed, the freedom to present critical exculpatory

250. *See* Hazelton, *supra* note 14, at 35-36 & n.2.

251. *See* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 151-53 (3d ed. 1996).

252. FED. R. EVID. 412.

253. *See* LILLY, *supra* note 251, at 152.

254. *See id.* at 153-55; *see also* WEISSENBERGER'S FEDERAL EVIDENCE 168-69 (2d ed. 1995). The general prohibition facially precludes evidence proffered by the accused for purposes of impeachment, and also overrides Federal Rule of Evidence 404(a) which normally permits the accused to enter evidence of pertinent traits of the victim's character. *See* FED. R. EVID. 412. Significantly, however, where excluding evidence would violate the constitutional rights of the defendant, Rule 412 contains an exception to allow such evidence. FED. R. EVID. 412(b)(1)(C). It is a rare occurrence when the exclusion of relevant evidence comports with the Federal Rules and yet contravenes the Constitution. Nevertheless, invoking countervailing constitutional principles, the Supreme Court has recognized that notwithstanding rape shield prohibitions, evidentiary rulings that unduly restrict the accused's ability to present evidence critical to his defense cannot be justified. *See* Olden v. Kentucky, 488 U.S. 227, 232-33 (1988) (holding that the accused was entitled to establish the victim's bias and motive to fabricate even though the impeaching evidence related to her sexual behavior).

255. *See In re* Oliver, 333 U.S. 257, 273 (1948); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

256. United States v. Scheffer, 523 U.S. 303, ___, 118 S. Ct. 1261, 1274 (1998) (Stevens, J., dissenting) (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

evidence constitutes a "fundamental element of due process of law."[257] This core right protects the integrity of the adversarial process, promotes fundamental fairness, and empowers the accused to defend against the charges of the state.

Perhaps the liberty most significantly imperiled by rape shield prohibitions is granted by the Compulsory Process Clause. The Sixth Amendment to the Constitution provides that "the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[258] The Supreme Court has repeatedly acknowledged that this basic right "is an essential attribute of the adversary system itself."[259] Indeed, it is well established that few rights "are more fundamental than that of an accused to present witnesses in his own defense."[260] To ensure adversarial fairness, "the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury."[261] At bottom, the right of the accused to offer the testimony of witnesses, to present his version of the facts to the jury so that it may decide where the truth lies "is in plain terms the right to present a defense."[262]

A vital complement to compulsory process, the Confrontation Clause of the Sixth Amendment[263] constitutionalizes the right of the accused "to make a defense as we know it."[264] Just as the accused has the right to present his own witnesses in presenting a defense, he has the right to confront the state's witnesses for the purposes of challenging their testimony before the jury.[265] Characterized by the Supreme Court as the "greatest legal engine ever invented for the discovery of truth" the right of the accused to face-to-face confrontation creates an opportunity for meaningful cross-examination and forms the core of the values embodied in the Confrontation Clause.[266] The elements of confrontation—physical

257. Washington v. Texas, 388 U.S. 14, 19 (1967).

258. U.S. CONST. amend. VI.

259. Taylor v. Illinois, 484 U.S. 400, 408 (1988).

260. Chambers v. Mississippi, 410 U.S. 284, 302 (1973); *see also* Webb v. Texas, 409 U.S. 95, 98 (1972) (per curiam).

261. *Washington*, 388 U.S. at 19-20.

262. *Id.* at 19.

263. The Constitution guarantees that in all criminal prosecutions the accused shall enjoy the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI.

264. Faretta v. California, 422 U.S. 806, 818 (1975).

265. *See* Washington v. Texas, 388 U.S. 14, 18-19 (1967).

266. California v. Green, 399 U.S. 149, 156-58 (1970). The right guaranteed by the Confrontation Clause includes not only a personal examination, but also:

(1) insures that the witness will give his statements under oath—thus impressing

presence, oath, personal cross-examination, and observation of demeanor by the trier of fact—combine to preserve the integrity of the fact-finding process by ensuring that evidence admitted against the accused is reliable and subjected to rigorous adversarial testing.[267] Indeed, the "mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony].'"[268]

While the right of the accused to present a complete defense is fundamental, it is not absolute.[269] Specifically, the scope of the right is circumscribed in two significant ways. First, the accused has no right to present irrelevant evidence.[270] State evidentiary laws excluding evidence deemed irrelevant, either judicially or legislatively, do not offend the Constitution.[271] Second, even a

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> him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. at 158 (citation omitted).

267. *See* Maryland v. Craig, 497 U.S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."); *see also* Mattox v. United States, 156 U.S. 237, 242-43 (1895). Describing the historical foundation of the Confrontation Clause, the Court in *Mattox v. United States* explained that:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id.

268. Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion) (citing California v. Green, 399 U.S. 149, 161 (1970)); *see also* Kentucky v. Stincer, 482 U.S. 730, 739 (1987) ("[T]he right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial."); Lee v. Illinois, 476 U.S. 530, 540 (1986) ("The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials.").

269. *See* Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

270. *See* Wood v. Alaska, 957 F.2d 1544, 1549-50 (9th Cir. 1992) (recognizing that where evidence is deemed irrelevant, the accused has no constitutional right to present it).

271. Arguably, legislative determinations of relevancy are facially unconstitutional to the extent they preclude a case-by-case assessment of the defendant's factual circumstances. However, the Supreme Court has flatly rejected this contention. *See* United States v. Scheffer, 523 U.S. 303, ___, 118 S. Ct. 1261, 1265-66 & n.7 (1998). In

defendant's right to present legally relevant evidence may be constitutionally proscribed by reasonable restrictions.[272] The Court has consistently recognized that the right of the accused to offer relevant evidence is not unlimited; rather, it must "bow to accommodate other legitimate interests in the criminal trial process."[273] For example, in refusing to strike as unconstitutional a *per se* exclusion of polygraph evidence offered by the accused, the Court has observed that "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials."[274] Similarly, to preclude the abrogation of "virtually every hearsay exception" triggered by a literal reading of the Confrontation Clause, the Court has conceded that under certain narrow circumstances, "competing interests, if 'closely examined,'

considering a state evidentiary ban on polygraph evidence, the Court in *Scheffer* observed that "[p]rior to *Daubert*, neither federal nor state courts found any Sixth Amendment obstacle to the categorical rule. Nothing in *Daubert* foreclosed, as a constitutional matter, *per se* exclusionary rules for certain types of expert or scientific evidence." *Id.* at 1265-66 n.7 (citation omitted). Therefore, logically relevant evidence cast as legally irrelevant, can be constitutionally precluded. Nevertheless, the Court has acknowledged that while a law may be facially valid, the Constitution requires an individualized inquiry into whether a specific application of an exclusionary rule is permissible. *See Craig*, 497 U.S. at 855 ("The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify."); Coy v. Iowa, 487 U.S. 1012, 1021 (1988) (reasoning that "[s]ince there ha[d] been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained" and concluding that any exception to the accused's right to confrontation would be allowed only when necessary to further important public policy, which requires more than a mere showing of a generalized "legislatively imposed presumption of trauma").

272. *See Scheffer*, 523 U.S. at ___, 118 S. Ct. at 1264; Rock v. Arkansas, 483 U.S. 44, 55 (1987); *Chambers*, 410 U.S. at 295.

273. *Chambers*, 410 U.S. at 295. For example, state and federal evidentiary laws reflect an undeniably legitimate interest in ensuring that only reliable evidence is presented to the jury. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993). Similarly, relevant evidence may be constitutionally excluded or circumscribed in the name of protecting a child witness from harassment or humiliation. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607-08 (1982); *cf.* Davis v. Alaska, 415 U.S. 308, 319 (1974). Other legitimate interests capable of justifying exclusion of relevant evidence include preserving the jury's role in making credibility determinations, minimizing collateral litigation, and avoiding jury confusion and waste of time. *See Scheffer*, 523 U.S. at ___, 118 S. Ct. at 1264-65; *see also* Michigan v. Lucas, 500 U.S. 145, 151 (1991) (holding that legitimate interests served by state notice requirement can justify precluding otherwise relevant evidence of a prior sexual relationship between rape victim and the accused); Taylor v. Illinois, 484 U.S. 400, 410-16 (1988) (declaring that the right to compulsory process was not violated where the court precluded testimony of surprise witness offered by the accused).

274. *Scheffer*, 523 U.S. at ___, 118 S. Ct. at 1264.

may warrant dispensing with confrontation at trial."[275] Consequently, a state's interest in the physical and psychological well-being of a victim-witness may be sufficiently important in certain cases to outweigh a defendant's rights under the Sixth Amendment.[276]

Ultimately, however, the exclusion of evidence central to the defendant's claim of innocence deprives the accused of his fundamental right to have the state's case encounter and survive the "'crucible of meaningful adversarial testing.'"[277] Some state rules of evidence may so "seriously impede the discovery of truth, 'as well as the doing of justice,' that they preclude the 'meaningful opportunity to present a complete defense' that is guaranteed by the Constitution."[278] Consequently, abrogation of the accused's fundamental right to compulsory process and confrontation will not be tolerated in the absence of a valid state justification. In complying with the admonition set forth in *Rock v. Arkansas*, restrictions on the defendant's right to present a defense "may not be arbitrary or disproportionate to the purposes they are designed to serve."[279] So too "where constitutional rights directly affecting the ascertainment of guilt are implicated, [an evidentiary] rule may not be applied mechanistically to defeat the ends of justice."[280] Specifically, the Court has held as unconstitutionally arbitrary or disproportionate, the exclusion of relevant evidence where it has infringed upon a sufficiently weighty interest of the accused.[281] The question thus becomes whether the state's interests are powerful enough to justify the categorical preclusion of otherwise relevant evidence offered by the accused. This inquiry must be weighed against the strength of the

275. Ohio v. Roberts, 448 U.S. 56, 63-64 (1980) (citing Chambers v. Mississippi, 410 U.S. 284, 295 (1973)); *see also* Kentucky v. Stincer, 482 U.S. 730, 739-44 (1987) (holding that where the accused had opportunity for full and effective cross-examination at trial, right to confrontation was not violated when trial court refused to allow him to be present during competency hearing of child witnesses); Pennsylvania v. Ritchie, 480 U.S. 39, 51-54 (1987) (plurality opinion) (holding that the right of the accused to cross-examination was not unconstitutionally abrogated where the state denied him access to investigative files); Bourjaily v. United States, 483 U.S. 171 (1987) (holding as constitutional hearsay statements of nontestifying co-conspirators admitted against the accused in absence of opportunity for face-to-face confrontation); United States v. Inadi, 475 U.S. 387 (1986) (same).

276. *See* Maryland v. Craig, 497 U.S. 836, 852 (1990).

277. *Scheffer*, 523 U.S. at ___, 118 S. Ct. at 1275 n.16 (Stevens, J., dissenting) (citation omitted); *accord* Crane v. Kentucky, 476 U.S. 683, 690-91 (1986); United States v. Cronic, 466 U.S. 648, 656-57 (1984).

278. *Scheffer*, 523 U.S. at ___, 118 S. Ct. at 1274 (Stevens, J., dissenting) (citation omitted).

279. 483 U.S. 44, 56 (1987).

280. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

281. *See Rock*, 483 U.S. at 58-61.

defendant's interests in having evidence admitted in certain cases.[282] If such exclusion significantly undermines fundamental elements of the accused's defense, a resounding "no" can be the only constitutional response.

C. Constitutional Balancing

The admissibility of RTS by the accused in a rape prosecution provides a novel and complex illustration of the inherent tension between the Constitution and the state's broad latitude to establish evidentiary rules in criminal trials and advance legitimate social policy. Seeking to defend themselves with the same scientific evidence available to the state, those accused of rape increasingly demand the right to present RTS testimony. Necessarily implicating a woman's sexual behavior, defense-sponsored RTS evidence is inadmissible under the expansive exclusionary provisions of rape shield laws. As discussed in Part III, unrestricted use of RTS by the accused foreshadows the revival of searching cross-examinations and risks the resurrection of compelled psychiatric testing. However, by invoking prosecutorial use of RTS, the state renders a woman's sexual past logically relevant for the defense. Consequently, rape shield laws that prevent the accused from presenting witnesses or cross-examining the victim about prior sexual trauma substantially circumscribe the ability of the accused to defend against the state's charge.

Rape shield prohibitions reflect valid and substantial government interests involving adversarial fairness and fact-finding integrity. Implicitly balanced against the rights of the accused, these interests are capable of justifying the abrogation of fundamental Sixth Amendment guarantees.[283] Courts generally uphold rape shield

282. *See Scheffer*, 523 U.S. at ___, 118 S. Ct. at 1275-76 (Stevens, J., dissenting). Courts also engage in a balancing of competing interests when determining the constitutionality of limitations on a criminal defendant's right to face-to-face confrontation. *See* Maryland v. Craig, 497 U.S. 836, 850-51 (1990) (emphasizing that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy" and holding that a state's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh a defendant's right to face his accusers); *see also* New York v. Ferber, 458 U.S. 747, 757 (1982) (sustaining as constitutional legislation aimed at protecting the physical and emotional well-being of youth "even when the laws have operated in the sensitive area of constitutionally protected rights"); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) (recognizing that a state's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment" is a "compelling" one).

283. *See* J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 554-60 (1980) (discussing the debate surrounding the issue of precisely when the accused's right to due process mandates the

restrictions as facially constitutional; however, an unprincipled application may result in an unconstitutional denial of the accused's fundamental right to present a meaningful defense.[284] As the Court explained *United States v. Scheffer*, the relevant constitutional inquiry focuses on whether rules precluding RTS evidence are "arbitrary or disproportionate" to the interests they are designed to serve.[285] Ultimately, in balancing the rights of the accused against compelling interests of the state, courts must establish whether circumscription of the Sixth Amendment right to "present a defense as we know it" can be justified by valid social policy.

(1) Logical Relevance

In determining whether or not a defendant's Sixth Amendment rights are violated, a two-step analysis is performed.[286] First, courts must inquire as to whether the excluded RTS evidence is relevant.[287] If it is not relevant, the accused enjoys no constitutional right to present it. If it is relevant, the inquiry turns to whether legitimate state interests outweigh the rights of the accused, or rather, whether the implicated rights are sufficiently critical such that exclusion cannot be justified.[288]

Evidentiary exclusions embodied in rape shield laws are often justified as reflecting a legislative determination that prior sexual behavior is simply not logically relevant to whether a rape occurred. Indeed, modern rape shield laws flatly reject the assumption, implicit in the earlier common law, that evidence that a woman previously consented to sexual relations with another is relevant to whether she gave her consent to the accused on a particular occasion.[289] Similarly renounced is the previously well-entrenched myth that a woman's chastity is relevant to her capacity to tell the truth.[290] Mirroring a

admissibility of sexual history evidence).

284. *See* Sandoval v. Acevedo, 996 F.2d 145, 149 (7th Cir. 1993) (recognizing that although the Indiana rape shield law has been held facially constitutional, the constitutionality of the law as applied to preclude particular exculpatory evidence requires a case-by-case analysis). Notably, the Supreme Court has not squarely addressed the constitutionality of substantive exclusionary provisions in state rape shield laws. *Cf.* Michigan v. Lucas, 500 U.S. 145, 151 (1991).

285. 523 U.S. at ___, 118 S. Ct. at 1264.

286. *See* Wood v. Alaska, 957 F.2d 1544, 1549-50 (9th Cir. 1992).

287. *See id.* at 1550.

288. *See id.*

289. *See* Galvin, *supra* note 223, at 798-800; *see also* Tanford & Bocchino, *supra* note 283, at 546-52; Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L. J. 1245, 1250-54 (1989); John Lausch, Note, Stephens v. Miller: *The Need to Shield Rape Victims, Defend Accused Offenders, and Define a Workable Constitutional Standard*, 90 N.W. U. L. REV. 346, 356-58 (1995).

290. *See* Galvin, *supra* note 223, at 800 ("[E]ven if unchastity were a character flaw, it

more balanced and accurate societal view of female sexuality, rape shield legislation recasts as irrelevant prior sexual history evidence offered to prove consent or credibility.[291]

It is well established that a defendant has no constitutional right to present irrelevant evidence.[292] Rather, the Sixth Amendment extends protection only to logically relevant evidence. Insofar as a woman's sexual behavior is deemed irrelevant to consent or credibility, defense-sponsored RTS can be constitutionally excluded. Relying on RTS to prove lack of consent, however, the state puts into issue the victim's past sexual history. As discussed previously in Part IV, RTS is incapable of conclusively determining that a particular rape constitutes the source of traumatic injury. Thus, sexual behavior evidence becomes logically relevant not to prove consent or challenge credibility, but rather to establish identity or source of trauma. Put another way, RTS proffered by the accused is relevant not to prove the victim's character for unchastity, but to establish that someone other than the accused could be criminally culpable.

Indeed, the Supreme Court has expressly recognized in an analogous context that the Constitution mandates the admissibility of evidence offered for purposes of impeachment. In *Olden v Kentucky*, the Court acknowledged that evidence bearing on the victim's sexual behavior is admissible when proffered to establish a motive to fabricate a charge of rape.[293] In *Olden*, the accused sought to introduce testimony regarding the victim's cohabitation with another man.[294] Presumptively inadmissible under rape shield laws, this evidence was not offered to establish that the victim's character for unchastity necessitated a finding of consent. Rather, it was offered to prove bias, "a proper and important function of the constitutionally protected right of cross-examination."[295]

Extending the Court's reasoning in *Olden* to the RTS context, admissibility of defense-sponsored RTS evidence offered for a valid purpose, is not only relevant, it is constitutionally required.[296] If rape

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has no relevance to general credibility. The limited use of sexual conduct evidence to impeach only *female* witnesses in sexual offense prosecutions indicates that its relevance was actually based on a sexist assumption that unchaste women will falsely charge rape.").

291. *See id.* at 798-99. "Because the decision to engage in consensual nonmarital sexual activity is no longer a decision to defy conventional norms, the behavior is 'character-neutral' and does not support the inference 'if she strayed once, she'll stray again.'" *Id.* Indeed, "[o]nce the notion of a character flaw is removed from the inferential process, the mere fact that the complainant has previously engaged in consensual sexual activity affords no basis for inferring consent on a later occasion." *Id.* at 799.

292. *See* Wood v. Alaska, 957 F.2d 1544, 1549 (9th Cir. 1992).

293. 488 U.S. 227, 231-32 (1988).

294. *Id.* at 230.

295. *Id.* at 231 (citing Davis v. Alaska, 415 U.S. 308, 315-16 (1974)).

296. *See, e.g., id.* (emphasizing that "the exposure of a witness' motivation in testifying

shield laws are justified solely on grounds of relevance, unrestricted admissibility of RTS rebuttal evidence to prove identity is arguably uncontroversial.[297] Advanced by commentators advocating the preservation of Sixth Amendment rights, the relevancy justification appears meritorious.[298] However, this argument has been implicitly rejected by Supreme Court decisions grounding the constitutionality of rape shield laws in valid legislative policies, rather than rules of relevance.[299]

Upholding the constitutionality of an exclusionary notice requirement, the Supreme Court in *Michigan v. Lucas* considered whether the legitimate interests underlying that provision could ever justify precluding evidence of a prior sexual relationship.[300] In reversing, the Court concluded that the Michigan Court of Appeals erred in adopting a *per se* rule that the state rape shield notice provision violated the Sixth Amendment where it was employed to preclude otherwise admissible evidence of past sexual conduct between the victim and the accused.[301] According to the Court, Sixth

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is a proper and important function of the constitutionally protected right of cross-examination") (citing Davis v. Alaska, 415 U.S. 308, 316-17 (1974)); Tague v. Richards, 3 F.3d 1133, 1136-39 (7th Cir. 1993) (recognizing that the admission of evidence generally excluded by rape shield laws may be constitutionally required where it is offered to prove that the source of injury was not caused by the accused); Jeffries v. Nix, 912 F.2d 982, 987-88 (8th Cir. 1990) (essentially refusing to find victim's sexual history relevant and admissible in the absence of compelling evidence of modus operandi); United States v. Kasto, 584 F.2d 268, 271 & n.2 (8th Cir. 1978) (noting that evidence of sexual activity may be constitutionally required when the evidence explains a physical fact in issue at trial, suggests bias or ulterior motive, or establishes a pattern of behavior clearly similar to the conduct at issue); People v. Sandoval, 552 N.E.2d 726, 737-38 (Ill. 1990) (recognizing that prior pattern exception could apply to the admission of evidence that is relevant as tending to show "signature").

297. *See* Williams v. State, 681 N.E.2d 195, 201 (Ind. 1997) (observing that many jurisdictions acknowledge that rape shield laws serve to emphasize the general irrelevance of a victim's sexual past and holding that admission of evidence offered not to show consent but to establish some other point may be constitutionally required); State v. Crims, 540 N.W.2d 860, 866-68 (Minn. Ct. App. 1995) (concluding that since the rape shield statute reflects general irrelevance of a victim's sexual history it does not remove relevant evidence from the jury's consideration).

298. *See* Galvin, *supra* note 223, at 902-05; Tanford & Bocchino, *supra* note 283, at 589-90; *see also Crims*, 540 N.W.2d at 867 ("Viewed from this perspective, the statute's relationship with the Constitution becomes one of harmony, not tension, because it serves to remind the bench that the victim's sexual history is normally irrelevant in a sexual assault prosecution.").

299. *See* Michigan v. Lucas, 500 U.S. 145, 151 (1991).

300. *Id.*

301. *See id.* at 152 (conceding that the "Sixth Amendment is not so rigid" and emphasizing that "'[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system'") (citing United States v. Nobles, 422 U.S. 225, 241 (1975)).

Amendment rights of the accused can be constitutionally limited by the "valid legislative determination that rape victims deserve heightened protection."[302] Indeed, to the extent Federal Rules of Evidence 401 and 403 combine to provide an equally powerful mechanism for excluding prejudicial evidence, Rule 412 is rendered a redundancy.[303] Consequently, the analysis must proceed to step two.

(2) Balancing the Interests

To the extent categorical preclusion of RTS operates to prevent a criminal defendant from presenting relevant evidence, his ability to confront adverse witnesses and present a defense is diminished.[304] Having established that RTS evidence offered by the accused is logically and permissibly relevant, the inquiry now centers on whether the accused's right to confront and cross-examine must bow to accommodate legitimate state interests.[305] The sole question is whether legitimate interests served by rape shield laws can constitutionally justify the *per se* preclusion of defense-sponsored RTS evidence. Following the admonition set out in *Rock*, restrictions on the defendant's right to present a defense "may not be arbitrary or disproportionate to the purposes they are designed to serve."[306] While rape shield legislation serves several legitimate interests, the blanket exclusion of RTS evidence offered by the accused constitutes an arbitrary means to promoting those objectives.[307] Moreover, the inability of the accused to present critical evidence significantly undermines fundamental elements of his defense.

The exclusion of prior sexual behavior advances several compelling state interests rooted in social policy and adversarial fairness.[308] Even assuming sexual history is capable of being *logically*

302. *Id.* at 151; *see also* Stephens v. Miller, 13 F.3d 998, 1002 (7th Cir. 1994) ("Rape shield statutes, like Indiana's, represent the valid legislative determination that victims of rape and, as here, attempted rape deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy."); Wood v. Alaska, 957 F.2d 1544, 1551 (9th Cir. 1992) (noting that even though evidence is relevant, it may be constitutionally excluded if its probative value is outweighed by other legitimate interests and stating that "the Supreme Court has held that certain legitimate interests can justify excluding evidence of a prior sexual relationship between a rape victim and a criminal defendant").

303. *See* Tuerkheimer, *supra* note 289, at 1271-73.

304. *See Lucas*, 500 U.S. at 149.

305. *See* Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

306. Rock v. Arkansas, 483 U.S. 44, 56 (1987).

307. *Cf.* United States v. Scheffer, 523 U.S. 303, ___, 118 S. Ct. 1261, 1264-65 (1998).

308. *See* State v. Gettier, 438 N.W.2d 1, 3 (Iowa 1989) (recognizing that the purposes underlying federal rape shield legislation include: (1) protecting privacy of the victims; (2) encouraging the reporting and prosecuting of sex offenses; and (3) preventing time-consuming and distracting inquiry into collateral matters). Arguably, the interests balanced against the rights of the accused weigh in favor of the victim, the state, and the

relevant, rape shield exclusionary rules reflect a conclusive determination that it can not be *legally* relevant. First, by precluding evidence with a great potential for confusion and distraction, exclusionary provisions of rape shield laws preserve the integrity of the truth-finding process and promote fundamental fairness at trial. Similarly, even where sexual behavior is remotely relevant, exclusion is necessary to prevent prejudicial impact upon jurors who could misinterpret evidence to conclude that a victim is morally undeserving of the law's protection.[309]

Second, rape shield laws advance legitimate social policy goals external to, and at times, in direct conflict with, the truth-seeking process at trial. Specifically, they are intended to "safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details."[310] The Supreme Court has expressly recognized that rape shield laws represent "a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy."[311] Consequently, modern rules of evidence encourage victims of rape to institute and participate in the prosecution of criminal sexual offenders, a substantial policy objective.[312] Finally, rape shield prohibitions perform a significant, if not unintended, educational function within the legal process. In determining which facts are legally relevant, rape shield laws at once diminish societal misconceptions about women and rape, and create a more judicious evidentiary paradigm.

Here, however, the compelling interests embodied in rape shield laws must give way to the right of the accused to put on a constitutionally complete defense.[313] The fundamental issue addressed by rape shield legislation involved the common law practice that "'considered the victim's character for chastity pertinent to whether or not she consented to the act that led to the charge of

accused. Presumably, all have an interest in preserving the integrity of the adversarial process, ensuring fundamental fairness, and promoting fair and effective law enforcement.

309. *See* 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman) (declaring that the new rape shield law was essential to protect victims from being tried on the basis of their moral worth); *see also* Galvin, supra note 223, at 794-95.

310. FED. R. EVID. 412 advisory committee's note.

311. Michigan v. Lucas, 500 U.S. 145, 149-50 (1991).

312. *See* Tuerkheimer, *supra* note 289, at 1245-46 (asserting that one of the most serious problems in the prosecution of rape cases is the "reluctance of victims of sexual assault to complain, so that the criminal justice system . . . is not even triggered into action"); Galvin, *supra* note 223, at 795 (recognizing that women refuse to report rape out of fear of being "twice traumatized": first by the rape, then by the system).

313. *See* Stephens v. Miller, 13 F.3d 998, 1011 (7th Cir. 1994) (Cummings, J., dissenting).

rape.'"[314] Constituting a narrow exception to rape shield prohibitions, defense use of RTS to rebut a charge of nonconsent neither seeks to attack the victim's character nor is intended to address the question of consent.[315] Rather, the exculpatory significance of RTS focuses on proving that the victim's symptoms are attributable to an alternative source of trauma. Consequently, limited use of RTS evidence does not contravene adversarial fairness or the truth-seeking function of exclusionary rules.[316] To the contrary, the state itself has a strong interest in ensuring the reliability of scientific evidence proffered in criminal trials.[317] However, the interest in evidentiary reliability also weighs heavily in favor of the accused.[318] Arguably then, the unqualified exclusion of defense-sponsored RTS is arbitrary to the purposes rape shield was designed to serve.

That the revelation of prior sexual trauma would undoubtedly engender anguish and embarrassment is indisputable. Equally clear, however, is Supreme Court precedent suggesting that the limited interest in minimizing embarrassment, standing alone, may not in itself outweigh the accused's interest in presenting relevant evidence. In *Davis v. Alaska*, the Court held that the state's interest in keeping a witness's juvenile record private did not outweigh the defendant's interest in producing relevant evidence.[319] The Court refused to challenge the legitimacy of the state's policy which sought to preserve juvenile offender anonymity.[320] Nevertheless, the Court forcefully

314. *Id.* at 1012 (Cudahy, J., dissenting) (citation omitted).

315. *See id.*

316. *Cf.* Wood v. Alaska, 957 F.2d 1544, 1552 (9th Cir. 1992). Refusing to admit evidence of the alleged victim's acting and modeling experience, the court recognized that:

> Of significantly more import are the concerns, intrinsic to the truth-finding process itself, that introducing the evidence would confuse the issues and unduly prejudice the jury. Introducing [the] evidence... would necessarily also introduce evidence of several previous incidents of sex with others, as well as evidence of exhibitionism. Because [the] experiences are not themselves relevant, the jury could be led to base its decision on irrelevant facts.

Id. In *Wood*, the Ninth Circuit concluded that since "many people consider prostitution and pornography to be particularly offensive, there is a significant possibility that jurors would be influenced by their impression of [the complainant] as an immoral woman." *Id.* However, unlike the prejudicial evidence in *Wood*, evidence of woman's previous traumatic experiences—sexual or not—does not necessarily engender the probability that the jury "could feel hostility for her as an immoral woman" and thus "base its decision on that hostility rather than on the actual facts of the case." *Id.*

317. *See* United States v. Scheffer, 523 U.S. 303, ___, 118 S. Ct. 1261, 1265-66 (1998).

318. *See* State v. Maday, 507 N.W.2d 365, 369 (Wis. Ct. App. 1993) ("Providing a defendant with meaningful pretrial discovery underwrites the interest of the state in guaranteeing that the quest for the truth will happen during a fair trial.").

319. 415 U.S. 308, 319 (1974).

320. *See id.* ("We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a

declared that "[w]hatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record . . . is outweighed by [the accused's] right to probe into the influence of possible bias in the testimony of a crucial . . . witness."[321] In reaching its conclusion, the Court emphasized that the "State could have protected [the witness] from exposure . . . by refraining from using him to make out its case."[322] Consequently, according to the Court, "the State cannot, consistent with the right of confrontation, require [the accused] to bear the full burden of vindicating the State's interest."[323]

Applying the reasoning set forth in *Davis*, that the victim may suffer temporary embarrassment is insufficient, standing alone, to justify blanket restrictions on critical constitutional rights.[324] To the extent defense-sponsored RTS is limited to rebuttal use, a woman theoretically retains the power to decide whether or not to subject herself to a potentially embarrassing experience. It is, therefore, fundamentally unfair to require the accused to bear the full burden of vindicating the state's interest in insulating rape victims from the adversarial process. Thus, the state's interest in allowing rape victims "to testify free from embarrassment and with [their] reputation unblemished must [under certain circumstances] fall before the right of [the accused] to seek out the truth in the process of defending himself."[325]

The Supreme Court has consistently recognized that the more critical the excluded evidence to the defense of the accused, the more important must be the asserted state interest.[326] Alternatively, the

juvenile offender.").

321. *Id.* This reasoning applies with equal force to the derivative state interest in encouraging reporting. *See* Wood, 957 F.2d at 1552 (concluding that the limited interest in encouraging reporting would not in itself outweigh the defendant's interest in presenting relevant evidence).

322. *Davis*, 415 U.S. at 320.

323. *Id.*

324. *See Wood*, 957 F.2d at 1552. Applying to rape cases the reasoning set out in *Davis*, the Ninth Circuit has similarly concluded that the "embarrassment . . . of having . . . experiences revealed would be so minor . . . that it cannot overcome [the accused's] right to present relevant evidence." *Id.* Admittedly, extending the logic of *Davis* and *Wood* is somewhat problematic in view of the fact that (1) *Davis* addressed the admissibility of evidence offered to prove bias—a core function of the Confrontation Clause, and (2) *Wood* analyzed the relative weight of evidence that was already public in nature—the victim's modeling and acting experience. However, given the questionable validity of RTS, and its probative, if not critical value when offered in rebuttal, limited use by the accused is required by the Constitution.

325. Davis 415 U.S. at 320; *see also* Stephens v. Miller, 13 F.3d 998, 1011 (7th Cir. 1994) (Cummings, J., dissenting).

326. *See Stephens*, 13 F.3d at 1020 (Ripple, J., dissenting) (citing Chambers v. Mississippi, 410 U.S. 284, 293-303 (1973)).

evidence must be sufficiently central to the defense of the accused to outweigh the legitimate state interests served by exclusion.[327] The criticality inquiry focuses on two factors: (1) the exculpatory significance of the evidence offered by the accused; and (2) the adequacy of the scope of cross-examination permitted. Employing an outcome determinative test, the Court in *United States v. Valenzuela-Bernal* pronounced that evidence is critical if it is relevant and "'*vital* to the defense'" such that its exclusion could affect the outcome of a trial.[328] "[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, [exclusionary rules] may not be applied mechanistically to defeat the ends of justice."[329] "Indeed, fundamental fairness mandates that the defendant be entitled to present evidence that is central to the defense and inextricably intertwined with the alleged criminal behavior."[330]

The probative value of RTS offered by the accused to rebut the state's use of the same renders it sufficiently critical to raise constitutional concerns. As discussed previously in Part IV, that RTS evidence is incapable of conclusively determining that a victim's symptoms are attributable solely to rape is well established. When the prosecution relies on RTS evidence to prove lack of consent, the ability of the accused to establish an alternative source of injury constitutes a fundamental element of his defense. Nowhere is this more essential than in cases where the prosecution, unable to produce physical evidence, relies primarily upon RTS expert testimony. Indeed, in the absence of convincing physical evidence, prosecutorial use of RTS testimony can provide the "crucial link in the proof" leveled against the accused.[331] Where the state's case is built upon a foundation of logical inferences, the intrinsic reliability of basic facts becomes vitally important to the accused. At bottom, where truth and accuracy are necessary elements of a legitimate prosecution, the "defendant cannot be denied the opportunity to elicit the core of operative facts that comprise his theory of defense."[332] In a rape prosecution, where the accused asserts a defense of consent, "this essential center certainly would include . . . the facts that . . . diminish the credibility of inculpatory evidence accumulated against [him]."[333] Consequently, in the context of RTS, when the reliability of critical scientific facts is central to the ascertainment of guilt, competing state

327. *See id.* at 1005-06 (Flaum, J., concurring).
328. 458 U.S. 858, 867-68 (1982) (citing Washington v. Texas, 388 U.S. 14, 16 (1967)).
329. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).
330. *Stephens*, 13 F.3d at 1018 (Coffey, J., dissenting).
331. Davis v. Alaska, 415 U.S. 308, 317 (1974).
332. *Stephens*, 13 F.3d at 1006 (7th Cir. 1994) (Flaum, J., concurring).
333. *Id.* (Flaum, J., concurring).

interests must unquestionably yield to vital constitutional rights of the accused.[334]

Perhaps the most troubling aspect of defense-sponsored RTS evidence arises in the context of compelled psychiatric exams. Probing clinical interviews represent a profound intrusion into the privacy of the victim and strike at the heart of core rape shield values. Indeed, the resurrection of compelled psychiatric examinations conjures legitimate fears of invasive questioning and deeply felt exposure. Refusing to jeopardize victim privacy, rape shield advocates may contend that even when the state relies on diagnostic RTS evidence based on a personal interview with the victim, an opportunity to discover the same evidence must be denied to the defendant. Rather, the accused must be restricted to the use of nonexamining experts, limited cross-examination, and argument.[335] While this position diminishes suffering endured by victims of rape, such a substantial incursion fails to comport with the Constitution.

That the Constitution demands a contrary result is evident for two reasons. First, psychological examinations used to refute the state's proffer of RTS evidence are not sought to challenge victim credibility or competence to testify.[336] Nor are they intended to invoke destructive cultural myths about female sexuality or to reflect upon the victim's moral worth. To the contrary, defense-sponsored RTS offered solely for purposes of rebuttal, is employed to fairly and legitimately defend against the state's charges. Offered for this limited purpose, personal interviews conducted by an expert for the accused do not implicate core rape shield values. Furthermore, where the state invites such exposure, temporary embarrassment endured by victims of rape is probably not sufficient, standing alone, to outweigh such critical constitutional rights of the accused.[337]

Second, as described above, the ability of the accused to present a complete defense is unconstitutionally circumscribed where he is precluded from adequately rebutting the prosecutorial use of RTS evidence.[338] In a 1959 case, the Supreme Court admonished that

334. Ironically, the interest in reliability, shared by both the state and the accused, tips the balance in favor of the accused. Indeed, the Supreme Court has expressly proclaimed that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." United States v. Nobles, 422 U.S. 225, 230-31 (1975).

335. *Cf.* State v. Maday, 507 N.W.2d 365, 370-71 (Wis. Ct. App. 1993).

336. *See id.* at 368 n.3.

337. *See* Davis v. Alaska, 415 U.S. 308, 319 (1974).

338. *See id.* at 315 (finding that in balancing the relative constitutional interests, "the essential question turns on [an] evaluation of the 'adequacy' of the scope of cross-examination" afforded to the accused).

"where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."[339] When denied access to evidence used by the state, the scope of cross-examination available to the accused may be insufficiently adequate to vindicate his constitutional guarantees. Medical science deems generalized expert testimony and the impersonal review of medical records to be "poor and unsatisfactory substitutes for testimony based upon prolonged and intimate interviews between the psychiatrist and the defendant."[340] Indeed, "[m]ost psychiatrists would say that a satisfactory opinion can only be formed after the witness has been subjected to a clinical examination."[341]

However, the Court has expressly recognized that "a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained."[342] Accuracy of the verdict is a vital concern when, in the absence of more probative physical proof, the state relies primarily on social science evidence. Furthermore, "[c]onsistent with the adversarial nature of the fact-finding process and the quasi-scientific nature of psychiatric opinion," the Supreme Court has rejected the contention that psychiatrists are capable of reaching a "unanimous diagnosis" of a person's mental condition.[343] Indeed, it is critical to understand that "[p]sychiatry is not... an exact science, and psychiatrists disagree widely and frequently on... the appropriate diagnosis to be attached to given behavior and symptoms."[344] Consequently, when the accused is precluded from presenting testimony of an examining expert when the state is able to do so, the state enjoys a strategic advantage that the accused cannot overcome.

"As the Supreme Court has reminded us on many occasions, the basic function of the criminal trial is to find, even in the most complex

339. Greene v. McElroy, 360 U.S. 474, 496 (1959).

340. State v. Briand, 547 A.2d 235, 239 (N.H. 1988) (quoting United States v. Albright, 388 F.2d 719, 725 (4th Cir. 1968)). Recognizing that the accused waives her Fifth Amendment right against self-incrimination when she relies upon battered woman syndrome evidence based upon a personal interview, the court held that the accused may be constitutionally compelled by the state to submit to a psychiatric examination. *See id.* at 239-40.

341. 1 MCCORMICK ON EVIDENCE § 44 at 167 (J. Strong ed., 4th ed. 1992).

342. Ake v. Oklahoma, 470 U.S. 68, 79 (1985).

343. Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990) (citing Ake v. Oklahoma, 470 U.S. 68 (1985)).

344. *Ake*, 470 U.S. at 81.

and delicate of human situations, THE TRUTH."[345] The categorical exclusion of RTS offered by the accused so seriously impedes the discovery of truth, "as well as the doing of justice," that it forecloses any "'meaningful opportunity to present a complete defense' that is guaranteed by the Constitution."[346] Thus, the desire to shield rape victims must under certain circumstances yield to another vital goal, the accused's right to present his defense.[347] Indeed, "[s]ending the innocent to jail, or depriving the guilty of due process, is not a price our Constitution allows us to pay for the legitimate and worthy ambition [of protecting] those already victimized from additional suffering."[348] However, that the constitutional balance must preserve core rape shield values and protect victims of rape from the resurrection of compelled psychiatric examinations engendered in the unfettered use of defense-sponsored RTS evidence is equally clear. Striking a constitutional balance requires weighing the interests of the victim against the rights of the accused on a case-by-case basis.[349] With this in mind, the following Part advances a general framework of admissibility that reflects a constitutional balance between the law and science of RTS, and the rights of the criminally accused.

VI. Framework of Admissibility

It is beyond question that evidence of RTS in a woman victimized by rape is not conclusive proof that a rape occurred. Nevertheless, a prosecutorial proffer of RTS serves a vital function in the successful prosecution of rape cases and the vindication of victim rights. In cases where there is a paucity of physical evidence, the presence of identifiable psychological and somatic responses is highly relevant as tending to show that a rape or some other traumatic event occurred. Indeed, RTS may be the strongest evidence available to the state when the accused advances a defense of consent. In addition, RTS evidence plays a powerful role in educating the jury about women's post-rape experiences.[350] When faced with counterintuitive behaviors that they do not understand, juries can be misled down the path of acquittal. Pervasive rape myths and misconceptions can result in situations where juries discredit the

345. Stephens v. Miller, 13 F.3d 998, 1019 (7th Cir. 1994) (Ripple, J., dissenting).

346. United States v. Scheffer, 523 U.S. 303, ___, 118 S. Ct. 1261, 1274 (1998) (Stevens, J., dissenting) (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

347. *See Stephens,* 13 F.3d at 1010-11 (Cummings, J., dissenting).

348. *Id.* at 1010 (Cummings, J., dissenting).

349. *See* Maryland v. Craig, 497 U.S. 836, 855 (1990) (holding that "[t]he requisite finding of necessity must of course be a case-specific one").

350. *See* Orenstein, *supra* note 9, at 701-10; *see also* Clarke, *supra* note 9, at 274-79; Massaro, *supra* note 31, at 402-10.

victim and refuse to punish the rapist. By explaining the scope and range of appropriate post-rape behavior, prosecution experts can debunk myths about rape and its victims.[351] This educational function of expert testimony provides a valuable opportunity to challenge prejudicial views while equalizing the odds for a just result. Consequently, RTS remains an essential arrow in the state's quiver and victims of rape should not be deprived the benefit of its intended use.

Equally clear is the realization that where the state has not first opened the door, the absence of RTS in a woman victimized by rape is insufficiently relevant to warrant admission by the accused. It is well established that the accused enjoys no constitutional right to present irrelevant evidence. Even marginally relevant evidence, though otherwise unobjectionable, may nevertheless be excluded if its probative value is substantially outweighed by principles of adversarial fairness and legitimate social policy. As such, where the state declines to introduce evidence of RTS, the right of the accused to assert its absence is not critical to a constitutionally complete defense.

RTS testimony is primarily relevant to explain the victim's ostensibly unusual post-rape reactions. As described at length in Part IV, women may react in vastly different ways to rape.[352] Some women display few, if any, symptoms and may appear outwardly unaffected. Others may not manifest any behavioral changes until months after the incident.[353] Consequently, the absence of symptoms consistent with RTS is of tangential relevance at best.[354] In addition, any modicum of probative value is substantially outweighed by the probability that the jury will be misled by contentions that the victim has failed to manifest a narrow range of symptoms associated with

351. *See* Orenstein, *supra* note 9, at 705-06.

352. *See* State v. Black, 745 P.2d 12, 16, 18 (Wash. 1987) (noting that RTS cannot be used as proof of lack of consent because victims of rape may display one of two directly conflicting emotional reactions: some display the outwardly emotional "expressed style" others display a calm "controlled style" and still others display no symptoms at all).

353. *See* State v. Jones, 615 N.E.2d 713, 719 (Ohio Ct. App. 1992). Recognizing the scientific indeterminacy inherent in RTS evidence, the court in *Jones* stated that:

> Thus, the fact that an alleged rape victim has not manifested certain specific symptoms of rape trauma syndrome is of little, if any, probative value, because it may signify merely that this particular victim has not manifested those particular symptoms at this stage of her recovery; she may yet show those symptoms, or she may never show them, notwithstanding that she has, in fact, been raped.

Id.

354. *See id.*; *see also* State v. McQuillen, 689 P.2d 822, 830 (Kan. 1984) (precluding defense-sponsored use of negative RTS on the theory that negative evidence has no probative value because "[t]here are no statistics to show that there is any value to a negative finding that the rape trauma syndrome is not exhibited by the alleged victim").

RTS.[355] Indeed, the jury may be tempted to conclude from the absence of "typical" responses that the woman could not have been raped, when it is possible that her symptoms have not manifested at the time of trial, or that she is displaying a controlled or asymptomatic style.[356]

Finally, and perhaps most notably, precluding the ability of the accused to introduce negative evidence of RTS preserves core rape shield values. In contending that she fails to exhibit "appropriate" post-rape behavior, negative RTS evidence represents an implicit attack on victim credibility and competence. In light of its marginal relevance and prejudicial impact, such an intrusion into the victim's privacy contravenes legislative intent and cannot be justified.

Nevertheless, once the state elects to rely upon evidence of RTS, the constitutional balance shifts irreversibly in favor of the accused. That is, once the state opens the door, the right of the accused to present RTS evidence of substantial equality constitutes a fundamental element of a constitutionally complete defense.[357] Under these circumstances, core constitutional values combine with principles of adversarial fairness and fact-finding integrity to substantially outweigh legitimate interests in victim privacy and protection.

Where the state restricts its proffer to consistency testimony by a nonexamining expert, a demand by the accused for a compelled examination may be constitutionally denied. Theoretically, a prosecutorial proffer of consistency testimony renders the victim's sexual history relevant to the accused. However, unlike a diagnosis of RTS, consistency testimony does not create a conclusive inference that rape is the underlying source of trauma. Consequently, testimony that a woman's post-rape reactions are consistent with a diagnosis of RTS should not open the door of inquiry into her own sexual past.

Under these circumstances, balanced against significant state interests, the right of the accused to a compelled examination is an insufficiently critical element of his defense to justify admissibility.

355. *See* Jones, 615 N.E.2d at 719.

356. *See id.*

357. *See* State v. Wheeler, 602 N.E.2d. 826, 832-33 (Ill. 1992). This approach has won acceptance in the context of battered woman syndrome evidence proffered by the accused to support a claim of self-defense. *See* State v. Briand, 547 A.2d 235, 240 (N.H. 1988) (holding that a criminal defendant waives her right to resist the state's request that she submit to a court ordered psychiatric examination when she: (1) submits to a psychiatric examination by her own experts; and (2) evinces an intention to rely on that testimony at trial); *cf.* State v. Hennum, 441 N.W.2d 793, 799 (Minn. 1989) (recognizing that limiting the scope of battered woman syndrome testimony to descriptive consistency testimony would remove the need for state compelled psychiatric examinations of the accused).

Indeed, restricting the accused to vigorous cross-examination of the state's expert, through which the scientific infirmities of RTS can be exposed, vindicates his right to defend against the state's charges with evidence of substantial equality. While the accused is free to refute whether the described symptoms are consistent with RTS in a hypothetical victim, he may not subject the victim to searching inquiry or compel a psychiatric examination. So long as the state refrains from presenting particularized testimony, the constitutional rights of the accused are adequately honored and the victim's privacy is preserved.[358]

However, where the state relies on an RTS diagnosis from an examining expert, the victim's sexual past becomes logically relevant for the accused. As illustrated previously, the ability of the accused to present a constitutionally complete defense is impermissibly circumscribed where he is precluded from adequately rebutting the prosecutorial use of RTS evidence. Implicit in a diagnosis of RTS is the assertion that rape can be the only cause of a woman's symptoms. Indeed, the conclusion that a woman suffers from RTS provides a virtual verisimilitude on the critical issue of whether she was raped.[359] While the accused may concede that a woman manifests symptoms consistent with RTS, he may, nevertheless, legitimately contend that a prior rape, attempted rape, or nonsexual trauma, rather than the rape for which he is charged, led to her present diagnosis.

Where the accused is precluded from examining the victim, he is unable to adequately defend against powerfully incriminating evidence. It is no argument to contend that the defendant's right to compulsory process is adequately honored when he is forced to rebut the state's examining witness by reviewing reports and observing victim trial testimony.[360] To the contrary, such a contention ignores "the inherent qualitative differences between testimony from an examining expert and a nonexamining expert."[361] Thus, to deny the accused an opportunity to form an equally forceful defense based on

358. Significantly, the state, and in theory, the victim, retains the power to render the woman's sexual past entirely irrelevant for the accused. By providing only general consistency testimony rather than a diagnostic opinion, the victim need not submit to a psychiatric examination by the state's expert. Through this seemingly formalistic distinction, the prosecution can avoid opening the door to defendants who would assert a right to compel victims to submit to an adverse psychiatric examination. *See, e.g.*, *Wheeler*, 602 N.E.2d at 832; State v. Maday, 507 N.W.2d 365, 372 (Wis. Ct. App. 1993).

359. *See* State v. Taylor, 663 S.W.2d 235, 240 (Mo. 1984) (en banc).

360. *See Wheeler*, 602 N.E.2d at 832. Nonverbal factors including posture and the inability to make eye contact are also considered. *See id.* In addition, an examining expert often bases her diagnosis on her own subjective interpretation of the victim's answers, which may not be disclosed in the report made available to the accused. *See id.*

361. *Id.*

an examination of the victim is to deprive him of a fundamentally fair trial.

At base, when the state has the exclusive right to examine the victim, the credibility of its expert is elevated above that of any nonexamining expert the accused could call.[362] This creates a clear advantage to the state in its efforts to prove a woman suffers from RTS.[363] However, as the Supreme Court has declared, "a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained."[364] The Constitution guarantees to the criminally accused the right to present a fair and complete defense in his own behalf; indeed, "[f]ew rights are more fundamental."[365] A model that makes prosecutorial use of diagnostic testimony contingent upon the ability of the accused to examine his alleged victim reflects a fair balance between legitimate interests in privacy and the constitutional rights of the accused.

Conclusion

In the absence of decisive judicial guidance, defendants will continue to assert the right to proffer negative evidence of RTS, to cross-examine victims concerning their sexual history, and to compel probing adverse psychiatric examinations. In adopting a principled solution to a vexing constitutional question, courts must carefully evaluate the social science supporting RTS research, while balancing legitimately protected privacy interests of rape victims against the Sixth Amendment rights of the accused. An evidentiary framework of admissibility that permits defendants to employ RTS evidence only when the state first opens the door reflects a deliberate balancing of these vital competing concerns. To the extent science is unable to define with sufficient exactitude symptoms attributable solely to rape, the victim's previous sexual history remains relevant to the accused. Consequently, so long as social science cannot conclusively determine that the cause of a woman's symptoms is the rape for which the accused is charged, the defendant must be permitted to show that it is not.

362. *See id.* at 833.
363. *See id.*
364. *Id.* (quoting Ake v. Oklahoma, 470 U.S. 68, 79 (1985)).
365. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).